



SAFEGUARDING RIGHTS OF MINING COMMUNITIES IN SOUTH AFRICA;

An Analysis of the Legal Mechanisms in force with a particular focus on Community Development Agreements.

by

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ABSTRACT

The benefits of Mineral resources must be distributed equitably and sustainably among all mining stakeholders including mining communities. Sustainable mining practices extend to the promotion of socio-economic development of local communities affected by mining activities. Mining communities often bear the brunt of the negative effects of mining, which include environmental degradation and interruption of social and cultural norms. In recent times, mining communities have increasingly raised concerns and complaints in opposition to the commencement of mining projects or ongoing mining projects where mining companies have failed to fulfil their end of the bargain. For example, in South Africa, the unrest leading to the unfortunate events at Marikana in 2012 led to significant scrutiny on the role of mining companies in the socio-economic development of mine labourers and mining communities. In particular, the effectiveness of Social and Labour Plans was brought under scrutiny. Additionally, the Constitutional Court has recently adjudicated cases relating to the relationship between mining companies and mining communities whereby the need for meaningful consultation with mining communities before the grant of a mining license was emphasized.

This dissertation analyses whether the legal framework in South Africa adequately safeguards the rights of mining communities. Further, it considers whether the mechanisms put in place in the mining legal and regulatory framework, for example, the requirement of consultation with interested and affected parties, sufficiently protect mining communities. A proposal is made for the incorporation of Community Development Agreements into the legal framework to safeguard mining community rights for the following reasons. First, the agreement provides legally binding obligations for both parties. Secondly, it serves a powerful mechanism in sharing the benefits of mining. Thirdly, it provides a clear structure for the mitigation of some of the negative impacts of mining through socio-economic development of mining communities.

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Chapter 1: Introduction

1.1. Introduction

Mining is a leading contributor to South Africa's economy.¹ A fundamental question facing the mining sector in South Africa is the sustainable socio-economic development of mining communities.² There is a significant focus on the promotion of sustainable mining practices, including fostering positive relationships between mining companies and mining communities.³ According to research conducted by McKinsey & Company and Price Waterhouse Coopers, mining companies in South Africa set aside significant resources to cater for challenges faced by mining communities and to uplift socio-economic status.⁴ Yet, in South Africa, the conflict between mining companies and mining communities has culminated in contentious litigation being adjudicated in different courts.⁵ For example, in the case of *Bengwenyama Minerals (Pty) Ltd and Others vs Genorah Resources (Pty) Ltd and Others*⁶ the Constitutional Court stamped its authority on the need for meaningful consultation with mining communities before the grant of a right in terms of the Mining Petroleum and Resources Development Act (MPRDA).⁷ These cases have shed light on whether the mining regulatory framework in South Africa sufficiently safeguards the rights and interests of mining communities.

The term "mining communities" refers to communities affected by mining and mining-related activities.⁸ Mining communities are often marginalized and have suffered systemic inequality.⁹ This dissertation considers the purview of

¹ Johannes Fedderke and Farah Pirouz 'The Role of Mining in the South African Economy' (2002) 5 SAJENMS NS 1; Department of Statistics South Africa 'Mining: a brief history' available on <http://www.statssa.gov.za/?p=9720> accessed on 4th May 2020; Minerals Council of South Africa 'Mining in SA' available on <https://www.mineralscouncil.org.za/sa-mining> accessed on 4th May 2020.

² Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 1; Linda Starke *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) ch 1.

³ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* 2016 available on <https://www.sahrc.org.za/pdf> accessed on 4th May 2020.

⁴ PWC 'SA Mine Highlighting the trends in the South African mining Industry' (2012) 4 available at <https://www.pwc.co.za/en/assets/pdf/sa-mine-nov-2012.pdf> accessed on 8th June 2020; The World Bank 'Digging Beneath the Surface: An exploration of the Net Benefits of Mining in Southern Africa' (2019) available at <http://documents.worldbank.org/curated/pdf/Digging-Beneath-the-Surface-An-Exploration-of-the-Net-Benefits-of-Mining-in-Southern-Africa.pdf> accessed on 8th June 2020.

⁵ *Maledu and Others vs Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53; *Baleni and Others vs Minister of Mineral Resources and Others* 2019 1 All SA 358 (GP) and *Bengwenyama Minerals (Pty) Ltd and Others vs Genorah Resources (Pty) Ltd and Others* 2011 4 SA 113 (CC). In these cases, the courts consistently held that communities in mining areas should not only be consulted but their consent must be obtained prior to the grant of a mining right by the Minister for mineral Resources.

⁶ 2011 4 SA 113 (CC)

⁷ *Maledu and Others* supra note 4, para. 106.

⁸ Linda Starke *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) ch 9.

⁹ Linda Starke *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) ch 9; Anri Heyns 'Mining Community Development in South Africa: A critical consideration of How the Law and Development Approach the concept "Community"' (2019) 12 *Law and Development Review* 585; The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mining Affected Communities in South Africa* (2016) available at <https://www.sahrc.org.za/home/21/files/FINAL.pdf> accessed on 18th February 2020.

how rights of mining communities have been affected and the legal mechanisms in force to safeguard their rights.¹⁰ For example, the members of the Lesetlheng Community located in the North West Province in South Africa recently filed a suit to challenge the grant of a mining right on their ancestral land which was protected by the Interim Protection of Informal Rights Act (IPILRA).¹¹

The preamble to the Constitution¹² recognises the need to remedy past injustices and seeks to “establish a society based on democratic values, social justice and fundamental human rights.”¹³ The Constitution affirms the commitment by the State to land reform and equitable access to natural resources.¹⁴ The need to reform the mining sector led to the enactment of the Mineral and Petroleum Resources Development Act (MPRDA).¹⁵ The MPRDA is the primary legislation regulating mining and related practices in South Africa. The long title to the Act provides for equitable access and sustainable development of the mineral and petroleum resources.¹⁶ Additionally, the MPRDA recognises the need to protect mining community interests and promote their socio-economic development.¹⁷ One of the concerns raised by mining communities is that the extraction of mineral resources on the land they inhabit commenced not only without their consent but also without any benefits accruing to them.¹⁸

Some of the measures taken by the MPRDA to protect the rights of mining community include the obligation for consultation and notification of interested and affected parties and the submission of a Social and Labour Plan.¹⁹ Additionally, mining companies should also focus on the promotion of local content and equity in ownership as advanced by the Mining Charter, which provides for Broad-Based Black Economic Empowerment.²⁰

With legislation providing the requirement for mining companies to engage with mining communities prior to the grant of a mining right, mining companies should have a structured approach to achieve this. Consequently, it will be easier to obtain Free, Prior and Informed Consent and also provide an avenue for monitoring and evaluation of socio-economic development of the mining community.²¹ Instructively, mining communities expect that the mining

¹⁰ Linda Starke *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) ch 1.

¹¹ *Maledu and Others vs Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53.

¹² Constitution of the Republic of South Africa, 1996.

¹³ Preamble to the Constitution of South Africa, 1996.

¹⁴ Section 25(4)(a) of the Constitution of South Africa, 1996.

¹⁵ Preamble, Mineral and Petroleum Resources Development Act 28 of 2002.

¹⁶ Preamble, Mineral and Petroleum Resources Development Act 28 of 2002.

¹⁷ Section 2 (c), (d) and (f) of the MPRDA.

¹⁸ Mnwana S 'Mining and Community Struggles on the Platinum belt: A case of Sefikile Village in the North West Province, South Africa' (2015) 2 *The extractives industries and society* 500-508.

¹⁹ Section 23(1)(c) of the MPRDA ;Regulation 46 of the MPRDA.

²⁰ Section 100 of the MPRDA.

²¹ Wang, Liang & Kwame et al 'Eliciting Drivers of Community Perceptions of Mining Projects through Effective Community Engagement,' (2016) 7 *Sustainability* 8, 658; Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 1; Linda Starke *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) ch 1.

companies will not only engage them during the application stage but also on a continuous basis during the duration of the project.²² This grants the mining company the social license to operate.²³

Governing the relationship between mining communities and mining companies is necessary for minimising the risk of conflict between the two parties.²⁴ A balance of rights for both parties is fundamental because while the mining company seeks to accrue financial benefits, the mining community bears the burden of negative impacts of mining.²⁵ For example, mining communities face environmental degradation and disruption of their social customs and norms.²⁶ The regulation of this relationship is therefore fundamental to achieve protection of community rights.

One of the ways in which the regulation of this relationship and the fostering of socio-economic development can be achieved is by way of a Community Development Agreement (CDA) signed by the mining community and the holder of a mining licence.²⁷ A CDA is defined as “a legally binding contract between the holder of a mining right and a community that will be affected by the mining operations and addresses issues relating to community development.”²⁸ Therefore, a CDA provides contractual obligations for both parties and serves a powerful mechanism in sharing the benefits of mining and mitigating the negative impacts of mining.²⁹ Additionally, CDAs provide a clear framework for engagement with the mining community which consequently promotes compliance by mining companies.

²² Wang, Liang & Kwame et al 'Eliciting Drivers of Community Perceptions of Mining Projects through Effective Community Engagement,' (2016) 7 *Sustainability* 8, 658.

²³ Daniel M Franks & Tamar Cohen 'Social License in Design: Constructive Technology Assessment Within a Mineral Research and Development Institution' (2012) 79 *Technological Forecasting & Social Change* 1229-1240. Defines social license to operate as the permission granted by a community to a mining company to carry out its operations therein.

²⁴ Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) ch 1; Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 *Journal of Business Ethics* 92; James M. Otto 'How Do we Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of resources as a driver of sustainable development*, (2018) 1 673 ; Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 *Journal of Business Ethics* 92.

²⁵ Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) ch 1; Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 *Journal of Business Ethics* 92.

²⁶ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* 2016 available on <https://www.sahrc.org.za/pdf> accessed on 4th May 2020.

²⁷ James M. Otto 'How Do we Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of resources as a driver of sustainable development*, (2018) 1 673.

²⁸ James M. Otto 'How Do we Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of resources as a driver of sustainable development*, (2018) 1 673.

²⁹ Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 *Journal of Business Ethics* 92.

1.2. Research Question and Aims

To ensure a symbiotic relationship between the mining companies and mining communities and to minimise the risk of conflict, an effective legal framework must be enacted. This dissertation seeks to analyse whether the legal framework in South Africa adequately safeguards the rights of mining communities. This dissertation proposes that in addition to the provisions in the MPRDA for consultation with interested and affected parties and the requirement for Social and Labour Plans, CDAs should also be considered in the mining regulatory framework in South Africa. This dissertation discusses the negotiation, implementation and enforcement of CDAs. This dissertation analysis of the mining regulatory framework in Kenya as it is hypothesized that the legislation providing for CDAs in Kenya may contain valuable lessons for South Africa.

1.3. Dissertation Structure

This dissertation has five chapters. The background and introduction have been provided in chapter one. Chapter Two considers why mining communities should be protected. It provides an overview of the need to build the social license to operate through consultation and seeking the Free, Prior and Informed Consent of mining communities. Additionally, it provides an outlook on the Marikana massacre³⁰ which occurred as a result of the use of lethal force by police to quell a labour strike.³¹ The massacre shed a spotlight on the loophole in socio-economic development through Social and Labour Plans³²

Chapter Three provides a legal analysis of the mining regulatory framework governing mining community rights in South Africa. The landmark judgments concerning mining community rights are also considered. Chapter Four analyses international best practice for the structure and clauses to be included in Community Development Agreements. Further, Chapter Four analyses the mining regulation providing for CDAs in Kenya. Lastly, Chapter Five provides the conclusion of the research and recommendations for law reform.

³⁰ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine In Marikana, In The North West Province* (2015). The Marikana massacre occurred in August 2012 where some mine workers participating in an industrial labour strike tragically lost their lives. The labour strike arose from grievances relating to the living and working conditions at a mine operated by Lonmin PLC

³¹ Ed Stoddard Mail & Guardian 'Miner Spring' may lead to more unrest' Mail & Guardian 2012 available at <https://mg.co.za/article/2012-09-06-miner-spring-may-lead-to-more-unrest/>; Timeline of the Marikana Massacre 2012 – 2013 available at <https://www.sahistory.org.za/article/timeline-marikana-massacre-2012-2013> accessed on 17th February 2020.

³² Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine In Marikana, In The North West Province* (2015). Social and Labour plans provided in Regulation 41 of the MPRDA will be discussed in Chapter 3.

Chapter 2: Overview of the Need to Build the Social License to Operate

2.1. Introduction

The requirement for consultation to be conducted between mining companies and mining communities is an emerging area in the mining sector.³³ Comprehensive consultations ought to be carried out before mining operations commence as well as at the stage of mine closure.³⁴ Mining activities impact the local community both positively and negatively.³⁵ Positively, for example, through the creation of menial jobs and negatively for example, through environmental degradation.³⁶ Civil society and Non-Governmental Organisations (NGOs) have assisted communities by lending their voice to fight for the protection of rights accruing to them in the event mining operations are conducted on the land they occupy.³⁷ In addition to the principles of Corporate Social Responsibility (CSR), these organisations have sought redress in court and lobbied for the passing of legislation to effectively safeguard mining communities.³⁸ This Chapter provides an overview of the importance of meaningful community engagement from the perspective of mining communities as well as the responsibility bestowed on mining companies to build the social license to operate. Further, the concerns raised by mining communities in relation to the negative impacts of mining will also be analysed. These areas have led to the development of the law on community engagement.³⁹

2.2. International outlook on mining community consultation

In 1990, mining companies and key stakeholders championed for voluntary responsible mining practices.⁴⁰ At that time, 'responsible mining' was equated to mean compliance with the legal and regulatory framework which were in force.⁴¹ This interpretation was narrow as it did not take into account the impacts of mining on the socio-economic development

³³ Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) ch 1; Sethulego Matebesi 'Social Licensing and Mining in South Africa' (2020) 2; PWC 'SA Mine Highlighting the trends in the South African mining Industry' (2012) 4 available at <https://www.pwc.co.za/en/assets/pdf/sa-mine-nov-2012.pdf> accessed on 8th June 2020.

³⁴ Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) ch 1.

³⁵ Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) ch 1.

³⁶ Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016); Wang, Liang & Kwame et al 'Eliciting Drivers of Community Perceptions of Mining Projects through Effective Community Engagement,' (2016) 7 *Sustainability* 8, 658.

³⁷ Sethulego Matebesi 'Social Licensing and Mining in South Africa' (2020) 2.

³⁸ Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 2.

³⁹ Section 10 of the MPRDA provides for consultation with interested and affected parties.

⁴⁰ World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 7 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

⁴¹ World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 7 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

of mining communities.⁴² The narrow approach led to a the development of a broader approach by way of a resolution passed in 1998 termed the Global Mining Initiative (GMI).⁴³ The resolution was passed by nine of the largest mining companies in the world at the Rio Earth Summit.⁴⁴ The scope of the resolution was to carry out research on the impacts of mining on the society.⁴⁵ The research was necessary as it provided a broader outlook on how mining companies should contribute to socio-economic development in mining communities.⁴⁶

In 2002, the International Institute for Environment and Development, in response to the GMI, conducted a research project known as Mining, Minerals and Sustainable Development (MMSD).⁴⁷ The main agenda of MMSD was to consider ways in which sustainable development can be achieved in the mining sector globally.⁴⁸ The report noted that mining companies had gained access to indigenous people's land without their consent.⁴⁹ This raised concern and mining companies were urged to first obtain consent especially in countries where consent was not provided for in the mining regulatory framework.⁵⁰ The report evidenced that the rights of indigenous people had been infringed.⁵¹

In further response to the GMI, the International Council on Mining and Mineral (ICMM) carried out a research on the socio-economic impacts of mining.⁵² The ICMM developed a community development toolkit which provided practical ways in which mining companies could achieve social responsibility.⁵³ The World Bank also responded to the GMI by publishing a handbook on Community Development Agreements which provided guidelines on sustainable development of mining communities.⁵⁴ The handbook is useful in regulating the relationship between mining companies

⁴² World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 7 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

⁴³ World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 7 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

⁴⁴ World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 7 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

⁴⁵ World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 7 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

⁴⁶ World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 8 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

⁴⁷ World Economic Forum *White Paper Review on Voluntary Responsible Mining Initiatives* (August 2015) at 7 available on http://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf accessed on 20th April 2020.

⁴⁸ International Institute for Environment and Development 'Breaking New Ground: Mining, Minerals and Sustainable Development' (2002) Research Project Report available on <https://pubs.iied.org/pdfs/9084IIED.pdf> accessed on 20th April 2020.

⁴⁹ International Institute for Environment and Development 'Breaking New Ground: Mining, Minerals and Sustainable Development' (2002) Research Project Report available on <https://pubs.iied.org/pdfs/9084IIED.pdf> accessed on 20th April 2020.

⁵⁰ International Institute for Environment and Development 'Breaking New Ground: Mining, Minerals and Sustainable Development' (2002) Research Project Report available on <https://pubs.iied.org/pdfs/9084IIED.pdf> accessed on 20th April 2020.

⁵¹ International Institute for Environment and Development 'Breaking New Ground: Mining, Minerals and Sustainable Development' (2002) Research Project Report available on <https://pubs.iied.org/pdfs/9084IIED.pdf> accessed on 20th April 2020.

⁵² International Council on Mining and Mineral (ICMM) 'Approaches to Understanding Development Outcomes from Mining' (July 2013) available on <https://www.csr.uq.edu.au/media/docs/464/Social-Indicators-08.08.2013.pdf> accessed on 20th April 2020.

⁵³ International Council on Mining and Mineral (ICMM) 'Approaches to Understanding Development Outcomes from Mining' (July 2013) available on <https://www.csr.uq.edu.au/media/docs/464/Social-Indicators-08.08.2013.pdf> accessed on 20th April 2020.

⁵⁴ World Bank, Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto) (June 2010) available at

and mining communities as it provides for contractual obligations for the socio-economic development of the mining community.⁵⁵

The need to recognise rights of indigenous people has been internationally recognised by the International Labour Organization (ILO) Convention No. 169, United Nations Declaration of the Rights of Indigenous People and the African Commission of Human and People's Rights provide for the rights of indigenous people.⁵⁶ The African Charter (the African Commission on Human and People Rights) provides the following criteria to identify indigenous people.⁵⁷ The criteria is that they live in a specific territory and have distinct cultural practices.⁵⁸ Therefore, mining companies should consider these aspects when conducting a social assessment to identify which group of people to consult.

Judgments of international courts have also emphasised the need to recognise the rights of indigenous people. Examples of these judgements were delivered in the case of *Centre for Minority Rights Development and Others vs Kenya*⁵⁹ and *Kalina and Lokono Peoples vs Suriname*.⁶⁰ In the *Suriname* case, the mining company obtained a license to mine but had failed to consult eight indigenous groups who were inhabitants and owners of the land where mining was being conducted.⁶¹ The Inter-American Court of Human Rights underscored that the duty to consult ought to begin at the mining license application stage before the mining project commences.⁶² Further, the court held that the mining company should obtain the community's consent after informing them of the impact the mining project is likely

<http://documents.worldbank.org/curated/en/278161468009022969/pdf/614820WP0P11781nal0Report0June02010.pdf> accessed 17th April 2020.

⁵⁵ World Bank, Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto) (June 2010) available at <http://documents.worldbank.org/curated/en/278161468009022969/pdf/614820WP0P11781nal0Report0June02010.pdf> accessed 17th April 2020.

⁵⁶ United Nations Declaration of the Rights of Indigenous People available on <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed on 24th April 2020.

⁵⁷ United Nations Declaration of the Rights of Indigenous People available on <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed on 24th April 2020.

⁵⁸ United Nations Declaration of the Rights of Indigenous People available on <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed on 24th April 2020.

⁵⁹ African Commission on Human and Peoples' Rights vs Republic of Kenya (006/2012) ACHPR (2017) Judgment available on www.achpr.org/decisions accessed on 24th April 2020.

⁶⁰ IACTHR (2015) Case 12.639 judgment available on <http://www.erasmuslawreview.nl> accessed on 24th April 2020.

⁶¹ *Kalina and Lokono Peoples vs Suriname* IACTHR (2015) Case 12.639 judgment available on <http://www.erasmuslawreview.nl> accessed on 24th April 2020.

⁶² *Kalina and Lokono Peoples vs Suriname* IACTHR (2015) Case 12.639 judgment available on <http://www.erasmuslawreview.nl> accessed on 24th April 2020.

to have.⁶³ Additionally, the State through the Ministry of Mineral Resources ought to ensure that before a mining right is granted, consent of the community and landowners is obtained.⁶⁴

Similarly, in the *Centre for Minority Rights Development* case, the African Court on Human and People's Rights Court held that the rights of the indigenous community had been infringed.⁶⁵ The indigenous community occupied land which a private developer had been issued with a permit by the Government of Kenya to construct a wildlife conservancy.⁶⁶ The court held that the indigenous community's rights to use and occupy the land had been violated as they had not been consulted prior to the permit being granted.⁶⁷ Therefore, the two courts above highlighted the protection of the rights of indigenous communities. Additionally, the courts underscored the need for prior consent and consultation whose aim is to enable the stakeholders to arrive at an informed decision.⁶⁸

2.3. Causes of conflict between mining companies and mining community

Kepore and Imbunm reported that in the period between January 2006 and July 2013, there were 843 large-scale mining-related protest movements in 87 countries.⁶⁹ The increase in protests coincided with an unprecedented rise in the demand and the prices of metals and minerals.⁷⁰ First, the conflicts were majorly centered on issues of deprivation of land for mining activities without consent and environment degradation.⁷¹ The desire for a greater share of the benefits derived from mining attributed to conflict between the mining companies and host communities across the globe.⁷² Mining is an income-earning business activity which enriches the mining company while interfering with the

⁶³ *Kalina and Lokono Peoples vs Suriname* IACTHR (2015) Case 12.639 judgment available on <http://www.erasmuslawreview.nl> accessed on 24th April 2020.

⁶⁴ *Kalina and Lokono Peoples vs Suriname* IACTHR (2015) Case 12.639 judgment available on <http://www.erasmuslawreview.nl> accessed on 24th April 2020.

⁶⁵ African Commission on Human and Peoples' Rights vs Republic of Kenya (006/2012) ACHPR (2017) Judgment available on www.achpr.org/decisions accessed on 24th April 2020.

⁶⁶ African Commission on Human and Peoples' Rights vs Republic of Kenya (006/2012) ACHPR (2017) Judgment available on www.achpr.org/decisions accessed on 24th April 2020.

⁶⁷ African Commission on Human and Peoples' Rights vs Republic of Kenya (006/2012) ACHPR (2017) Judgment available on www.achpr.org/decisions accessed on 24th April 2020.

⁶⁸ *Kalina and Lokono Peoples vs Suriname* IACTHR (2015) Case 12.639 judgment available on <http://www.erasmuslawreview.nl> accessed on 24th April 2020; African Commission on Human and Peoples' Rights vs Republic of Kenya (006/2012) ACHPR (2017) Judgment available on www.achpr.org/decisions accessed on 24th April 2020.

⁶⁹ Kepore, Kevin P., and Benedict Y. Imbun 'Mining and stakeholder engagement discourse in a Papua New Guinea mine.' *Corporate Social Responsibility and Environmental Management* 18, no. 4 (2011): 237.

⁷⁰ Kepore, Kevin P., and Benedict Y. Imbun 'Mining and stakeholder engagement discourse in a Papua New Guinea Mine' (2011) 4 *Corporate Social Responsibility and Environmental Management* 18, 237. The increase in the price of metals and minerals led to a five fold increase in the investment in mining and exploration activities.

⁷¹ Kevin P., and Benedict Y. Imbun 'Mining and stakeholder engagement discourse in a Papua New Guinea Mine' (2011) 4 *Corporate Social Responsibility and Environmental Management* 18, 237.

⁷² Gibson, Ginger, and Deanna Kemp 'Corporate Engagement with Indigenous Women in the Minerals Industry: Making Space For Theory' (2017) *In Earth Matters*, 104-122.

livelihood and customs of the host community.⁷³ Therefore, the host community is likely to demand for a fair share and greater control of mineral resources and revenues derived therein.⁷⁴

Secondly, lack of resources and marginalization is a catalyst for conflict as it creates a sense of deprivation of the distribution of the benefits of mining.⁷⁵ Thirdly, political leaders may negatively influence protests against mining operations in a bid to assert their political legitimacy.⁷⁶ Fourthly, mining adversely affects the environment in several ways.⁷⁷ For example, through the loss of biodiversity, contamination of soil and water bodies through the release of toxic waste.⁷⁸ Therefore, concerns that mining negatively impacts the environment may lead to conflict from the host community as they seek to protect their ancestral land.⁷⁹ Consequently, mining companies should consider ways in which to mitigate grievances arising from the host community through consultation. One method of mitigating these grievances is through seeking Free Prior and Informed Consent.

2.4. Building the Social Licence to Operate

The earliest discussion on contextualising the Social Licence to Operate (SLO) is traced to Shocker and Sethi.⁸⁰ Shocker and Sethi emphasized that social contracts were required for business operations to flourish.⁸¹ The scholars further noted that economic, social and political benefits promote the success of companies.⁸²

In the mining sector, negative impacts attributed to mining underscore the importance of social responsibility by mining companies.⁸³ Building the SLO by mining companies begins prior to the commencement of mining

⁷³ Isabelle Anguelovski 'Understanding the Dynamics of Community Engagement of Corporations in Communities: The Iterative Relationship Between Dialogue Processes and Local Protest at the Tintaya Copper Mine in Peru' (2011) *Society & Natural Resources* 384-399.

⁷⁴ Gibson, Ginger, and Deanna Kemp 'Corporate Engagement with Indigenous Women in the Minerals Industry: Making Space For Theory' (2017) *In Earth Matters*, 104-122.

⁷⁵ Isabelle Anguelovski 'Understanding the Dynamics of Community Engagement of Corporations in Communities: The Iterative Relationship Between Dialogue Processes and Local Protest at the Tintaya Copper Mine in Peru' (2011) *Society & Natural Resources* 384-399.

⁷⁶ Heledd Jenkins 'Corporate Social Responsibility and the Mining Industry: Conflicts and Constraints' (2011) 11 *Corporate Social Responsibility and Environmental Management* 32.

⁷⁷ Mritunjoy Sengupta *Environmental impacts of mining: Monitoring, Restoration and Control* (1993) Ch 1.

⁷⁸ Mritunjoy Sengupta *Environmental impacts of mining: Monitoring, Restoration and Control* (1993) Ch 1.

⁷⁹ Mritunjoy Sengupta *Environmental impacts of mining: Monitoring, Restoration and Control* (1993) Ch 1.

⁸⁰ Shocker A, & S Prakash Sethi 'An approach to incorporating societal preferences in developing corporate action strategies' (1973) 15 *California Management Review* 97.

⁸¹ Shocker A, & S Prakash Sethi 'An approach to incorporating societal preferences in developing corporate action strategies' (1973) 15 *California Management Review* 97.

⁸² Shocker A, & S Prakash Sethi 'An approach to incorporating societal preferences in developing corporate action strategies' (1973) 15 *California Management Review* 97.

⁸³ Thompson, I., Tapscott, C. & De Wet, P.T. (2018), 'An exploration of the concept of community and its impact on participatory governance policy and service delivery in poor areas of Cape Town, South Africa' *Politikon*, 45(2): 276–290.

operations, where consultation with the community is initiated.⁸⁴ A mining company should begin to cultivate trust from the locals at the early stages of the project, thereby reducing potential conflicts in future.⁸⁵

A consequential result of building the SLO is that communities freely support the mining project as it is considered socially legitimate.⁸⁶ The approval of the project requires consent primarily from the mining community, which can be obtained as a result of consultation.⁸⁷ A literal interpretation of the principle of Free, Prior and Informed Consent dictates that consent should be freely obtained without coercion.⁸⁸ Further, the impact of a mining project should be comprehensively communicated to the mining community.⁸⁹ Failure to inform and engage the entire community or to obtain their feedback is often a sign of illegitimacy of the project by the stakeholders who were not involved in the consultation.⁹⁰ Therefore, it is prudent that the mining company involves the entire community in consultations.

Additionally, in the mining sector, community development which aids in building the SLO has primarily been associated with granting of monetary relief and development of infrastructure in marginalized areas where mining operations are located.⁹¹ Further, mining companies may use CSR initiatives as a way of obtaining the SLO through the building of human, cultural, economic and social capital in the communities where their operations are based.⁹² The next section considers the pillars of CSR in the mining sector and the spotlight of CSR in the Marikana case in South Africa.

⁸⁴ Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 2.

⁸⁵ Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 2.

⁸⁶ Welker, Marina A. 'Corporate security begins in the community': mining, the corporate social responsibility industry, and environmental advocacy in Indonesia.' *Cultural Anthropology* 24, no. 1 (2009): 142-179.

⁸⁷ Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 2.

⁸⁸ Lila Bererra-Hernandez 'Indigenous Peoples and Free, Prior and Informed Consent in Latin America' in Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) 75.

⁸⁹ Lila Bererra-Hernandez 'Indigenous Peoples and Free, Prior and Informed Consent in Latin America' in Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) 75.

⁹⁰ Lin, Philip & Bin Li et al 'The Relationship between Corporate Governance and Community Engagement: Evidence from the Australian Mining Companies' (2015) 43 *Resources Policy* 28-39.

⁹¹ Freek Cronjè & Charity S. Chenga 'Sustainable Social Development in the South African Mining Sector' (2009) 3 *Development Southern Africa* 414.

⁹² Wang, Liang & Kwame et al 'Eliciting Drivers of Community Perceptions of Mining Projects through Effective Community Engagement,' (2016) 7 *Sustainability* 8, 658.

2.5. Conceptualising Corporate Social Responsibility

The concept of Corporate Social Responsibility (CSR) asserts that business carried out by companies must be conducted responsibly and sustainably.⁹³ The concept of CSR does not have a single definition and several authors have attempted to define its scope better.⁹⁴ Kerr⁹⁵ and Howard⁹⁶ have identified sustainable decision making, stakeholder engagement, community involvement, and transparency as the four pillars of CSR.⁹⁷ Integrated sustainable decision making entails companies considering environmental and socio-economic factors when making decisions.⁹⁸ This dissertation suggests that the four pillars should be incorporated into the mining legislative framework in South Africa to achieve meaningful community engagement.

CSR is enforced through either voluntary or mandatory measures.⁹⁹ Voluntary measures entail companies employing codes of conduct to ensure compliance with CSR particularly when legislation does not specifically provide for its implementation.¹⁰⁰ Enforcement of CSR through mandatory measures in legislation would result in non-compliance resulting in punishment through a fine or penalty.¹⁰¹

CSR has been recognised internationally through legal instruments adopted by the UN, OECD, World Economic Forum and the ILO.¹⁰² The Global Compact brochure on Corporate Sustainability in the World Economy provides that companies must not only adhere to universal principles of corporate sustainability but must also contribute to local development in the area they operate.¹⁰³ The OECD Guidelines for Multinational Enterprises also emphasises

⁹³ Mostert, Chisanga & Howard et al 'Corporate Social Responsibility in the Extractive Industries of Namibia, South Africa and Zambia: Choices and Consequences' in Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) 95.

⁹⁴ A Dahlsrud *How Corporate Social Responsibility is Defined: An analysis of 37 Definitions* (2008) 11-20; Janine Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1; Kerr, Janda & Pitts *Corporate Social Responsibility: a Legal Analysis* (2009) 5; Garriga & Mele 'Corporate Social Responsibility theories: Mapping the territory' (2004) 53 *Journal for Business Ethics* 52.

⁹⁵ Kerr, Janda & Pitts *Corporate Social Responsibility: a Legal Analysis* (2009) 5.

⁹⁶ Janine Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1.

⁹⁷ Janine Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1.

⁹⁸ Janine Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1; Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: a legal analysis*, (2009) 5.

⁹⁹ Kerr, Janda & Pitts *Corporate Social Responsibility: a Legal Analysis* (2009) 5; Janine Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1.

¹⁰⁰ Kerr, Janda & Pitts *Corporate Social Responsibility: a Legal Analysis* (2009) 5; Janine Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1.

¹⁰¹ Kerr, Janda & Pitts *Corporate Social Responsibility: a Legal Analysis* (2009) 5; Janine Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1.

¹⁰² Mostert, Chisanga & Howard et al 'Corporate Social Responsibility in the Extractive Industries of Namibia, South Africa and Zambia: Choices and Consequences' in Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) 95. NOTE THE INSTRUMENTS BEING REFERRED TO HERE.

¹⁰³ United Nations, Global Compact brochure on Corporate Sustainability in the World Economy (2013) available at https://www.unglobalcompact.org/docs/publications/UN_Global_Compact_Guide_to_Corporate_Sustainability.pdf.

that one of the pillars of CSR is engagement with the community.¹⁰⁴ These instruments serve as soft law in South Africa by providing the guidelines and principles applicable. The Kimberly Process¹⁰⁵, the Extractive Industries Transparency Initiative (EITI)¹⁰⁶ and the African Mining Vision¹⁰⁷ advocate for socio-economic benefits to trickle down to the community.

In South Africa, the Companies Act¹⁰⁸ and the third King Report on Good Governance ('King III')¹⁰⁹ provide the regulatory framework for CSR. Mining companies are required to adhere to the provisions.¹¹⁰ King III provides for the triple bottom line approach, which emphasises that at the local level, companies should consider not only economic growth but they should also adhere to high standards of environmental sustainability and social development.¹¹¹ The MPRDA also provides measures to enforce CSR.¹¹² Section 37(2) provides that mining companies should adhere to principles of sustainable development in their mining operations by putting into consideration the environmental, social and economic impacts of mining.¹¹³ The requirement of having Social and Labour Plans annexed to an application for a mining right ensures that mining companies have factored in the application of CSR.¹¹⁴ Local economic development and empowering the community with skills is a key aspect of the SLP.¹¹⁵ The MPRDA regulations provide that the Department of Mineral Resources (DMR) should ensure SLP annual reports are thoroughly scrutinised to ensure compliance by mining companies. The regulatory provisions on SLPs are considered further in Chapter Three.

2.6. Corporate Social Responsibility Under Scrutiny in South Africa's Mining Industry - The Marikana Massacre

Unfortunate events in the mining industry pitting mining labourers and mining companies against each other led to deeper scrutiny of the adherence of CSR by mining companies in South Africa.¹¹⁶ In 2012, the spotlight was turned on

¹⁰⁴ United Nations, Global Compact brochure on Corporate Sustainability in the World Economy (2013) available at https://www.unglobalcompact.org/docs/publications/UN_Global_Compact_Guide_to_Corporate_Sustainability.pdf.

¹⁰⁵ The Kimberly Process provides a Certification scheme for countries mining diamonds to participate in. The aim of KP is to put an end to conflict in diamond trade. See www.kimberlyprocess.com.

¹⁰⁶ EITI promotes transparency and accountability in the extractives industry by providing a score card for natural resource management. See www.eiti.org.

¹⁰⁷ AMV provides guiding principles for sustainable development of mineral resources in the respective African countries. See www.africaminingvision.org.

¹⁰⁸ Act 71 of 2008 came into force on 1st May 2011.

¹⁰⁹ King III report came into force on March 2010. King I report was published in 1994 with the aim of providing corporate governance principles in post apartheid South Africa.

¹¹⁰ Companies Act, Act 71 of 2008 applicable to all companies incorporated in South Africa.

¹¹¹ King III report.

¹¹² Jannie Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1.

¹¹³ Jannie Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1., Social and Labour Plans provided for in regulations to the MPRDA GNR 26275 and 527, 23rd April 2003

¹¹⁴ Social and Labour Plans provided for in regulations to the MPRDA GNR 26275 and 527, 23rd April 2003

¹¹⁵ Regulation 41 MPRDA

¹¹⁶ Jannie Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1.

the contentious relationship between mining companies and mining communities, including mineworkers by the events of the 'Miner Spring' which preceded and caused the Marikana Massacre.¹¹⁷ It drew global attention to the grievances of mineworkers in South Africa.¹¹⁸

In August 2012 there were several industrial labour strikes in the platinum mining industry in South Africa.¹¹⁹ One of the labour protests was at a mining company known as Lonmin PLC, operating in Marikana, where heavily armed police used lethal force against a surging crowd in an attempt to quell the strike.¹²⁰ As a result, forty-four mining workers died and over seventy people were injured.¹²¹ A commission of inquiry was established to investigate the circumstances leading to the unrest and the tragic death of the mineworkers.¹²² The role of Lonmin, the Department of Mineral Resources (DMR), the South Africa Police Service and the National Union of Mine Workers was investigated to establish whether any act or omission was caused leading to the outbreak of violence.¹²³

The commission of inquiry established that Lonmin PLC had not complied with its obligations provided in the Social Labour Plan that the company had submitted to the DMR.¹²⁴ Lonmin PLC had an obligation under the MPRDA to submit a Social and Labour Plans as a condition for the grant of its first mining right which was granted under the repealed Minerals Act¹²⁵ prior to it being converted into a mining right under the MPRDA.¹²⁶ Lonmin complied, and the DMR approved the SLP binding Lonmin to its obligations.¹²⁷ The SLP inter alia provided that it would improve the housing conditions for its workers.¹²⁸ However, at the time of the unrest, Lonmin PLC had constructed only three of the

¹¹⁷ Jannie Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry' (2014) 131 SALJ 1; Marikana is in the North West Province.

¹¹⁸ Ed Stoddard Mail & Guardian 'Miner Spring' may lead to more unrest' Mail & Guardian 2012 available at <https://mg.co.za/article/2012-09-06-miner-spring-may-lead-to-more-unrest/>.

¹¹⁹ Timeline of the Marikana Massacre 2012 – 2013 available at <https://www.sahistory.org.za/article/timeline-marikana-massacre-2012-2013> accessed on 17th February 2020.

¹²⁰ Greg Marinovich 'The murder fields of Marikana: the cold murder fields of Marikana' 2012 available at <https://www.iol.co.za/news/the-murder-fields-of-marikana-1373581> accessed on 17th February 2020.

¹²¹ Greg Marinovich 'The murder fields of Marikana: the cold murder fields of Marikana' 2012 available at <https://www.iol.co.za/news/the-murder-fields-of-marikana-1373581> accessed on 17th February 2020.

¹²² Former President Jacob Zuma established the Marikana Commission of Inquiry pursuant to section 84 (2) of the Constitution. The Terms of Reference were published in Gazette No. 35680.

¹²³ Marikana Commission of inquiry Terms of Reference.

¹²⁴ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in The North West Province* (2015). Social and Labour plans provided in Regulation 41 of the MPRDA. It is a requirement under section of the MPRDA for a SLP to be provided prior to the grant of a mining right, see chapter 3

¹²⁵ Act No 50 of 1991.

¹²⁶ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in The North West Province* (2015). Chapter 3 contents of SLP in MPRDA.

¹²⁷ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in The North West Province* (2015).

¹²⁸ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in The North West Province* (2015).

five thousand five hundred houses provided for in the SLP.¹²⁹ Lonmin PLC had stipulated in its SLP that it would accommodate its migrant employees by building the 5,500 houses in addition to the existing accommodation hostels.¹³⁰ The SLP submitted to the DMR in 2006 provided that the additional houses were to be completed by September 2011.¹³¹ During the inquiry, it also became apparent that Lonmin PLC had also filed inconsistent SLP annual reports and failed to comply with its plans for sustainable development.¹³² As a result, the CSR role of Lonmin PLC and other mining companies was brought under scrutiny.

2.7. Conclusion

The incorporation of community consultation and the requirement of Free Prior and Informed Consent is crucial in safeguarding the rights of mining communities. Mining companies hold unequal bargaining power over mining communities. Therefore, legislative provisions are necessary to regulate the relationship between the two parties. The negative impacts of mining which affects the social fabric of the local community can be resolved through regulations which protect the community. Building the social license to operate entails cultivating a positive relationship through consultation prior to the commencement of the mining operation. CSR principles ought to be incorporated in legislation to ensure mining companies are accountable in mitigating the negative effects of mining and in improving the socio-economic development of mining communities. Chapter Three provides an in-depth analysis of how the regulatory and legislative framework in South Africa protects mining communities and whether it adequately safeguards their rights.

¹²⁹ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, In The North West Province* (2015) pg 528 -531, para 19. Lonmin PLC had committed to building 5500 houses for its employees by 2011.

¹³⁰ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province* (2015) 528 -531.

¹³¹ Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province* (2015); Pete Lewis *Marikana :Lonmin's Dodgy Housing Record Ground Up* available at <https://www.groundup.org.za/article/marikana-lonmins-dodgy-housing-record/> accessed on 14th June 2020.

¹³² Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, In The North West Province* (2015) 529-532; David Bruce 'Summary and Analysis of the Report on the Marikana Commission of Inquiry (2015) Council for the advancement of the South African Constitution available at <https://www.casac.org.za/wp-content/uploads/2015/02/Summary-and-Analysis-of-the-Report-of-the-Marikana-Commission-of-Inquiry.pdf> accessed on 18th February 2020.

Chapter 3: Legislative Framework Governing Mining Community Rights in South Africa

3.1. Introduction

Chapter Two concluded that the nature of mining operations dictates that mining companies should contribute to the socio-economic development of mining communities. This contribution is an essential requirement for the mining company's social license to operate. This Chapter identifies the statutory obligations on protection of mining communities provided in South Africa's mining regime. Additionally, this Chapter provides an analysis of whether these provisions adequately protect the interests of mining communities. The legal provisions on the socio-economic interests of a mining community discussed in this chapter is threefold. The first discussion is on the consultation process with interested and affected parties provided in the Mineral and Petroleum Resources Development Act (MPRDA)¹³³. The second discussion is on the requirement for Social and Labour Plans (SLP) which must accompany an application for a mining right.¹³⁴ The last discussion is on the provisions of Broad-Based Economic Empowerment provided for in the Mining Charter.¹³⁵ It is imperative to note that mining communities are also affected by negative environmental impacts which result from mining activities. However, this dissertation will not focus on the environmental regulations governing mining.

3.2. Background on Legislative and Policy Context on Mining Laws Relating to Mining Communities

The history of colonialism and apartheid in South Africa negatively impacted mining communities as the laws in force did not sufficiently provide for the protection of community rights.¹³⁶ A review of these laws shows that there was a unilateral approach in the regulation of the relationship between the government and mining companies whilst excluding local communities from participation.¹³⁷ In the constitutional era, several statutes and policies were enacted to reflect democracy and inclusivity of mining communities and historically disadvantaged South Africans (HDSA).¹³⁸

¹³³ Section 10(1)(b), 16(4)(b), 22 (4)(b), 27 (5)(b) and 39 of the MPRDA.

¹³⁴ Section 23 of the MPRDA.

¹³⁵ Section 100 of the MPRDA. The Mining Charter currently in force was published by the DMR on October 2018.

¹³⁶ Aninka Classens and Baitumelo Matlala, 'Platinum, poverty and Princes in post-apartheid' (2018) 4 *New South African Review* 118; Sethulego Matebesi 'Social Licensing and Mining in South Africa' 1 (2020) 1; Munyaradzi Saruchera, 'Securing Land and Resource rights in Africa : Pan-African Perspectives at 23 available on http://repository.uwc.ac.za/bitstream/handle/10566/4346/saruchera_securing_land_resource_rights_africa_pan_african_perspectives_2004.pdf?sequence=1&isAllowed=y#page=145 accessed on 21st April 2020.

¹³⁷ Sethulego Matebesi 'Social Licensing and Mining in South Africa' (2020) 1.

¹³⁸ Sethulego Matebesi 'Social Licensing and Mining in South Africa' (2020) 1.

For example the MPRDA,¹³⁹ the Mining Charters which provide for Broad-Based Black Economic Empowerment (BBBEE),¹⁴⁰ and the Interim Protection of Informal Rights Act (IPILRA).¹⁴¹

The development of the mining industry in South Africa began in the 1870s with the discovery of diamond and gold deposits.¹⁴² Some of the laws which formed the bedrock of the pre-constitutional mineral law regime in South Africa are the Mining Rights Act,¹⁴³ the Precious Stones Act,¹⁴⁴ the Mining Titles Registration Act,¹⁴⁵ and the Atomic Energy Act.¹⁴⁶ These statutes regulated, among other aspects, the mining and beneficiation of all minerals and the applications for mining rights.¹⁴⁷ However, a reading of these Acts shows that they were silent on protection of community rights and promotion of their socio-economic development, especially in relation to land inhabited by communities where mineral deposits were discovered. These statutes did not provide obligations to the applicant or holder of a mining or prospecting right on how to exercise mining rights while ensuring the rights of the mining community are protected.

In 1986, a White Paper on a Mineral Policy of South Africa was adopted. It paved the way for the enactment of the now-repealed Minerals Act.¹⁴⁸ The long title of the Minerals Act provided that the Act regulated the granting of prospecting and exploitation rights as well as mine rehabilitation and health and safety of mineworkers.¹⁴⁹ Section 5(1) of the Act provided that the holder of prospecting rights had the right to enter the land where the minerals are located and carry out mining operations.¹⁵⁰ Further, the Act provided that the occupier of land could lawfully take sand, stones and gravel for farming or building.¹⁵¹ Therefore, the holder of a prospecting or exploitation right had rights which superseded the rights of the occupier of the land.¹⁵² Meaning that no consent or agreement between the two parties was required to enable the mineral right holder to carry out mining operations.

¹³⁹ Act No. 28 of 2002 provides for consultation with interested and affected parties including mining communities prior to the grant of a prospecting or mining right.

¹⁴⁰ The Mining Charters are provided for section 100 of the MPRDA with the aim of promoting economic development of mining communities through inter alia ownership of equity and economic gain through beneficiation.

¹⁴¹ Act 31 of 1996 recognises informal right to land and protects the owners from the arbitrary dispossession of land.

¹⁴² Badenhorst and Mostert 'Mineral and Petroleum Law of South Africa: Commentary and Statutes, Revision Service 10, 2014.

¹⁴³ Act 20 of 1967.

¹⁴⁴ Act 73 of 1964.

¹⁴⁵ Act 16 of 1967.

¹⁴⁶ Act 90 of 1967.

¹⁴⁷ Badenhorst and Mostert 'Mineral and Petroleum Law of South Africa: Commentary and Statutes, Revision Service 10, 2014.

¹⁴⁸ Act 50 of 1991, Badenhorst and Mostert 'Mineral and Petroleum Law of South Africa: Commentary and Statutes, Revision Service 10, 2014.

¹⁴⁹ Long Title, Minerals Act, Act 50 of 1991.

¹⁵⁰ Section 5(1) of the Minerals Act, Act 50 of 1991.

¹⁵¹ Section 5 of the Minerals Act, Act 50 of 1991.

¹⁵² P J Badenhorst 'The Make-Up of Transitional Rights to Minerals: Something Old, Something New, Something Borrowed, Something Blue?' (2011) 128 SALJ 765; P J Badenhorst 'New Order to Minerals in South Africa: Ten Years after Mayday' (2018) 26 African Journal on International and Comparative Law 368.

The 1991 Act consolidated the preceding statutes¹⁵³ which dealt with mineral exploitation. The 1991 Act was the last piece of legislation dealing with the granting of prospecting and exploitation rights prior to the enactment of the MPRDA.¹⁵⁴ Substantial amendments to the mineral regime were made following the establishment of the government in 1994 by the African National Congress party.¹⁵⁵ For example, the introduction of the provision of consultation.¹⁵⁶ The substantial changes in the mineral regime began with the publishing of a minerals and mining policy for South Africa,¹⁵⁷ which reflected the tenets of the Constitution.

3.3. The Constitution

The Constitution¹⁵⁸ provides that all persons have the right to equal protection and the full benefit of the law.¹⁵⁹ The Constitution further protects mining communities under section 24, which provides for sustainable development and use of natural resources. The Constitution directs parliament and the government to provide legislation and other measures that will ensure that justifiable economic and social development is achieved in the development and use of natural resources.¹⁶⁰ Further, it provides for the protection of mining communities from the arbitrary deprivation of property.¹⁶¹ In the instances where property must be expropriated in the interest of the public, the State's commitment to providing equitable access to the country's natural resources is included in the definition of "public interest".¹⁶² Additionally, the Constitution directs the State to take reasonable legislative measures to ensure the progressive realization of rights provided in the Constitution.¹⁶³

The social and economic development of local communities is provided for in the Constitution through the establishment of local government.¹⁶⁴ Municipalities are directed to prioritize the development needs of the community and encourage community participation.¹⁶⁵ One of the ways in which municipalities achieve socio-economic development of local communities is through Integrated Development Plans (IDP).¹⁶⁶ The municipality is mandated to provide services which cater to the basic needs of the community.¹⁶⁷ For example, through the development of

¹⁵³ Save for the Mining Titles Registration Act.

¹⁵⁴ Badenhorst and Mostert 'Mineral and Petroleum Law of South Africa: Commentary and Statutes, Revision Service 10, 2014.

¹⁵⁵ Badenhorst and Mostert 'Mineral and Petroleum Law of South Africa: Commentary and Statutes, Revision Service 10, 2014.

¹⁵⁶ Section 10 of the MPRDA.

¹⁵⁷ The Green Paper and White Paper contained the mineral policy post 1994. The White paper was published in gazette notice number 2359 on 20th October 1998 and mirrored the contents of the Green paper.

¹⁵⁸ Constitution of the Republic of South Africa, 1996.

¹⁵⁹ Section 9(1) of the Constitution.

¹⁶⁰ Section 24(b)(iii) of the Constitution.

¹⁶¹ Section 25 (1) of the Constitution.

¹⁶² Section 25 (2) and (4)(a) of the Constitution.

¹⁶³ Section 24 of the Constitution.

¹⁶⁴ Section 151 and 153 of the Constitution.

¹⁶⁵ Section 153 of the Constitution.

¹⁶⁶ Section 35 (1) of the Municipal Systems Act 32 of 2000. The Act prescribes that IDPs should be developed through public participation and focuses on community needs.

¹⁶⁷ Chapter 4 of the Municipal Systems Act 32 of 2000.

infrastructure for roads and water, construction of schools and health centres.¹⁶⁸ Additionally, an applicant for a mining right must make reference to the Municipality's IDP in the area where the mine is located during the drafting of the Social and Labour Plan (SLP).¹⁶⁹ An SLP provides the socio-economic developmental plans which a holder of a mining license sets out to implement.¹⁷⁰

The Constitution further recognises the role of traditional leaders in local communities.¹⁷¹ The Traditional Leadership and Governance Framework Act¹⁷² provides for the governance framework of traditional communities through traditional councils. Further, it recognizes the need for partnership between municipalities and traditional leaders.¹⁷³ Traditional leaders have the mandate of performing functions which relate to administration of land and cultural practices under customary law.¹⁷⁴ In the mining sector, an applicant for a mining right must consult with both the traditional leaders in a community and the members of the community.¹⁷⁵ This principle was developed following the Constitutional Court's judgment in the case of *Bengwenyama Minerals (Pty) Ltd and Others vs Genorah Resources (Pty) Ltd and Others*¹⁷⁶ Previously, some traditional leaders unilaterally consulted with mining license applicants without involving the members of the mining community.¹⁷⁷ Some traditional leaders unlawfully received kickbacks from politicians and directors of mining companies therefore abusing their mandate.¹⁷⁸ Concerns were also raised that traditional leaders misrepresented the legitimate interests of the community.¹⁷⁹ The following section discusses the process of application for a mining right and mining community consultation provided for in the MPRDA.

3.4. State Sovereignty and Custodianship Over Mineral Resources

The MPRDA was enacted to give effect to the constitutional provision regulating access to the country's natural resources.¹⁸⁰ The preamble to the MPRDA recognises that mineral and petroleum resources belong to all citizens

¹⁶⁸ Chapter 4 of the Municipal Systems Act 32 of 2000.

¹⁶⁹ Regulation 46 of the MPRDA.

¹⁷⁰ Regulation 46 of the MPRDA.

¹⁷¹ Section 211 and 212 of the Constitution.

¹⁷² Act No. 41 of 2003.

¹⁷³ Chapter 2 of the Traditional Leadership and Governance Framework Act, (TLGA) Act No 41 of 2003.

¹⁷⁴ Section 19 of the TLGA.

¹⁷⁵ *Maledu and Others vs Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*. 2019 (2) SA 1 (CC); Aninka Claassens 'Mining Magnates and Traditional Leaders' in Mbongiseni Buthelezi, Dineo Skosana & Beth Vale 'Traditional Leaders in a Democracy; Resources, Respect and Resistance' (2018) 93.

¹⁷⁶ 2011 4 SA 113 (CC), See also *Maledu and Others vs Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*. 2019 (2) SA 1 (CC);

¹⁷⁷ Aninka Claassens 'Mining Magnates and Traditional Leaders' in Mbongiseni Buthelezi, Dineo Skosana & Beth Vale 'Traditional Leaders in a Democracy; Resources, Respect and Resistance' (2018) 1 92-94.

¹⁷⁸ Aninka Claassens 'Mining Magnates and Traditional Leaders' in Mbongiseni Buthelezi, Dineo Skosana & Beth Vale 'Traditional Leaders in a Democracy; Resources, Respect and Resistance' (2018) 1 92-94.

¹⁷⁹ Aninka Claassens 'Mining Magnates and Traditional Leaders' in Mbongiseni Buthelezi, Dineo Skosana & Beth Vale 'Traditional Leaders in a Democracy; Resources, Respect and Resistance' (2018) 1 93.

¹⁸⁰ Section 24 (b)(iii) of the Constitution.

under the custodianship of the State.¹⁸¹ The State has the mandate to promote sustainable development of mineral and petroleum resources while ensuring the promotion of socio-economic development.¹⁸² The preamble also recognises the State's commitment to the social upliftment of communities affected by mining.¹⁸³

The MPRDA recognises the international law principle on the exercise of sovereignty by the State over mineral resources.¹⁸⁴ Sovereignty over natural resources dictates that the State should regulate the exploitation and development of mineral resources on behalf of its citizens.¹⁸⁵ The State exercises its sovereignty over mineral resources through the granting of prospecting and mining rights.¹⁸⁶ Additionally, as the custodian of mineral resources, the State should ensure the sustainable development of the environment and promotion of the social and economic welfare of its citizens.¹⁸⁷

One of the ways in which sustainable development and promotion of social and economic development are achieved is through conditions attached to the grant of a prospecting or mining right.¹⁸⁸ Section 5A of the MPRDA prohibits the following illegal acts in relation to mining. First, carrying out mining activities without an environmental authorisation.¹⁸⁹ Secondly, carrying out mining activities without authorisation from the DMR.¹⁹⁰ Thirdly, carrying out mining activities without giving a twenty-one-day notice to the landowner or lawful occupier of the land.¹⁹¹ The requirement for an SLP has not been included as a prohibited act despite the fact that it is crucial to the socio-economic development of mining communities. The requirement of an SLP should therefore be listed as one of the prohibited acts in section 5A of the MPRDA. It is imperative to note that prohibited acts under statutes are categorised as offences which would attract penalties.¹⁹² However, the prohibited illegal acts discussed hereinabove have not been specifically listed as offences in the MPRDA.¹⁹³ A reason for this could be because an applicant must meet all the requirements under section 5A of the MPRDA prior to the award of a prospecting or mining right. The following section discusses

¹⁸¹ MPRDA, preamble.

¹⁸² MPRDA, preamble.

¹⁸³ MPRDA, preamble; Hanri Mostert 'Mineral Law Principles and Perspectives' (2012) 82.

¹⁸⁴ Section 2(a) of the MPRDA;

¹⁸⁵ UN General Assembly resolution 1803 (XVII) available on

<https://www.ohchr.org/EN/ProfessionalInterest/pages/NaturalResources.aspx> accessed on 9th March 2019. The principle on 'Permanent Sovereignty over Natural Resources' was adopted by the United Nations through resolution number 1803 in 1962.¹⁸⁵ The background to the adoption of the resolution was the as a result of the transition from colonisation to independence of a number of countries in Africa.

¹⁸⁶ Section 3(2)(a) of the MPRDA provides that 'the State through the Minister of Mineral Resources may grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, technical co-operation permit, reconnaissance permit, exploration right and production right.'

¹⁸⁷ Section 3(3) of the MPRDA.

¹⁸⁸ For example, provision of an environmental plan/programme, provision of a Social and Labour Plan and consultations with interested and affected parties. Section 5, 23 and 10 of the MPRDA respectively.

¹⁸⁹ Section 5A (a) of the MPRDA.

¹⁹⁰ Section 5A (b) of the MPRDA.

¹⁹¹ Section 5A (c) of the MPRDA.

¹⁹² P.J Van der Walt, G. Cronje, B. Smit *Criminology: An Introduction* (1985) 24.

¹⁹³ Section 98 of the MPRDA provides for offences.

how the interests of mining communities have been considered during the licensing and application procedure for mining and prospecting rights.

3.5. Licensing and Application Procedure for Mining Rights

The types of mining rights provided for by the MPRDA include reconnaissance permissions,¹⁹⁴ prospecting rights,¹⁹⁵ permission to remove minerals during prospecting, retention permits, mining permits and mining rights.¹⁹⁶ The application for each category of rights is provided for in the MPRDA.¹⁹⁷ Consultation with interested and affected parties must be conducted by applicants seeking a prospecting right, a mining right or a mining permit.¹⁹⁸

An application for both the prospecting or mining right and an environmental authorisation are lodged simultaneously at the office of the Regional Manager where the land is situated.¹⁹⁹ The Regional Manager accepts the application if there is no prior application or mining right on the same land has been granted.²⁰⁰ Once the Regional Manager accepts the application, he notifies the applicant to submit the environmental programme or plan²⁰¹ and to consult with the landowner or lawful occupier and interested and affected parties.²⁰² After the applicant obtains the environmental authorisation from the Department of Environment and the report on the consultation, the Regional Manager forwards the application to the Minister for Mineral resources.²⁰³ Similarly, at this stage an SLP is not listed as one of the documents required to be submitted when applying for a prospecting right. SLPs are included in applications for mining rights but not during applications for prospecting rights.²⁰⁴ Before granting a mining right, the Minister also considers whether the Applicant has complied with the provisions of the Mining Charter providing for black economic empowerment.²⁰⁵ Therefore, the interests of mining communities which are factored in during the application stage is through the requirement of consultation, environmental authorisation, SLP and compliance with the Mining Charter. Other considerations made by the DMR include the access to financial resources which enables the mining

¹⁹⁴ Definitions, MPRDA; Reconnaissance is the search for minerals which includes remote techniques and assessment of seismic data.

¹⁹⁵ Section 16 of the MPRDA.

¹⁹⁶ Section 3(2)(a) of the MPRDA.

¹⁹⁷ Section 16, 17, 20, 22-26 of the MPRDA.

¹⁹⁸ Section 10 of the MPRDA.

¹⁹⁹ Section 16 (1)(a) of the MPRDA for an application for a prospecting right and section 22- 26 for an application for a mining right.

²⁰⁰ Section 16 (2)(b) and (c) and section 22 (2) of the MPRDA.

²⁰¹ Chapter 5 of the National Environmental Management Act provides for the environmental reports to be filed within 60 days of the notice.

²⁰² Section 16(4)(a) and (b) of the MPRDA.

²⁰³ Section 16 (5) of the MPRDA.

²⁰⁴ Section 23 (1)(e) of the MPRDA.

²⁰⁵ Section 23 (1)(h) of the MPRDA.

company to optimally conduct the prospecting or mining operation²⁰⁶ and compliance with the provisions of the Mine Health and Safety Act.²⁰⁷ Lastly, the applicant must have complied with the relevant provisions in the MPRDA.²⁰⁸

3.6. Consultation with Interested and Affected Parties

The MPRDA regulations and guidelines, published by the DMR, provide for consultation with interested and affected parties, including the mining community.²⁰⁹ The list of interested and affected parties is comprehensive, and the onus is on the mining company to ensure that all parties are consulted.²¹⁰ The list encompasses parties that may be affected by mining operations and must therefore be informed of the possible impacts of mining.²¹¹ The burden rests on the mining company to allocate funds for the consultation process. In listing the parties, the word 'or' is not used. Rather, the word 'and' is used. Therefore, the mining company has the mandate to ensure it reaches out to all the parties for the consultation process.

The consultation²¹² process begins with the Regional Manager informing the interested and affected parties that an application for a prospecting or mining right/permit has been lodged and accepted.²¹³ The consultation should be conducted in good faith to enable the mining company to make informed decisions on their project.²¹⁴ The consultation process provides an opportunity for the interested and affected party and the applicant to discuss how to cushion the effects of the interference of the landowners right to use their property.²¹⁵ The notice also invites the parties to submit their comments.²¹⁶ The guidelines prescribe that the Regional Manager should post a notice at the office's notice board, magistrate's court, advertise in the local or national newspaper and also publish the notice in the Provincial gazette.²¹⁷ The Regional Manager may adopt other publication means, for example, posting the notice on the DMR's website.²¹⁸ However, to ensure that the interested and affected parties receive this information, the medium

²⁰⁶ Section 17 (1)(a) of the MPRDA.

²⁰⁷ Section 17 (1)(d) of the MPRDA.

²⁰⁸ Section 17 (1)(e) of the MPRDA.

²⁰⁹ Regulation 3 of the MPRDA.

²¹⁰ Guidelines for Consultation with Communities and Interested and Affected Parties published by the DMR. The guidelines provide that interested and affected parties include; host communities, land owners (traditional and title deed owners), traditional authority, land claimants, lawful land occupiers, the Department of Land Affairs, the local municipality, any other person (including on adjacent and non-adjacent properties), the relevant government departments, agencies and institutions.

²¹¹ Guidelines for Consultation with Communities and Interested and Affected Parties published by the DMR. (The DMR Consultation Guidelines).

²¹² Clause D of the guidelines defines consultation as a two way communication process where the applicant enquires and listens to the concerns and interests of the interested and affected parties.

²¹³ Section 10 (1)(a) of the MPRDA. The Regional Manager informs the affected parties within 14 days of submission of the application.

²¹⁴ Clause E of the DMR Consultation Guidelines.

²¹⁵ *Bengwenyama-Ya-Maswazi Community and others vs Genorah Resources (Pty) Limited and others* 2011 4 SA 113 (CC) para 65.

²¹⁶ Section 10 (1)(b) of the MPRDA. Clause C of the Guidelines; the comments should be submitted within 30 days where the application relates to a prospecting right and mining permit and within 180 days for a mining right application.

²¹⁷ Clause F (1) of the DMR Consultation Guidelines.

²¹⁸ Clause F of the DMR Consultation Guidelines.

of communication used to reach the local and affected parties should be widespread for example through announcements on a public system or radio. The aim is to ensure that the notice period does not lapse before the target audience receives the information. The objections received are referred to the Regional Mining Development and Environmental Committee for consideration and to advise the Minister.²¹⁹

The applicant has the duty to identify and list the names of the interested and affected parties.²²⁰ The applicant should also notify and consult the landowner and the lawful occupier.²²¹ The guidelines do not provide for the avenue for redress for an interested or affected party who has not been identified and invited for the consultation. The guidelines should provide, for example, that an aggrieved party should notify the Regional Manager that he has been excluded in the consultation. Additionally, the guidelines should provide that the Regional Manager may assist an applicant in identifying the interested and affected parties. The importance of this is that the Regional Manager and officials from the Department of Lands have the necessary resources and a better understanding of the mining area.

The consultation meeting entails the applicant informing the interested and affected parties of the stages of the mining operation and the potential impacts that will affect them, the environment, the social or cultural practices and on their land.²²² The applicant must take minutes of the meeting, have the members in attendance sign the register and video record the meeting if possible.²²³ The applicant needs to discuss the possible effects of the mining operation exhaustively and address the concerns of the parties.²²⁴ Further, the applicant must ensure that a detailed and accurate record of the consultation meeting is kept for future use in the event a dispute arises on the consultation process.²²⁵ The applicant should conduct a procedurally fair consultation with the interested and affected parties.²²⁶ Thereafter the applicant must submit a consultation report to the Regional Manager.²²⁷ The report should be comprehensive and provide the list of interested parties, the concerns raised by the parties on the impact on of the land, environment, socio-economic environment, and cultural practices.²²⁸

²¹⁹ Section 10 (2) of the MPRDA.

²²⁰ Clause G (1) of the DMR Consultation Guidelines.

²²¹ Clause G (2) of the DMR Consultation Guidelines.

²²² Clause G (3.2) of the DMR Consultation Guidelines.

²²³ Clause G (3.2.4) of the DMR Consultation Guidelines.

²²⁴ Clause G (3.2.4) of the DMR Consultation Guidelines.

²²⁵ Clause G (3.2.4) of the DMR Consultation Guidelines.

²²⁶ *Bengwenyama Bengwenyama-Ya-Maswazi Community and others vs Genorah Resources (Pty) Limited and others* 2011 4 SA 113 (CC) para 66.

²²⁷ Clause G(4) of the DMR Consultation Guidelines. The report should be submitted within 30 days from the date of the Regional Managers notice.

²²⁸ Clause G (4.5) of the DMR Consultation Guidelines.

3.7. Landmark Judgments on the MPRDA Consultation Process

Case law has contributed to the development of laws and guidelines which aim at safeguarding the interests and rights of mining communities in South Africa. *Alexor vs Richtersveld Community*²²⁹ is one of the earliest cases relating to a native community's right to land. The Richtersveld Community had been dispossessed of their land in the 1920s after the discovery of diamonds on the subject land.²³⁰ The community filed a suit seeking restitution of their land in accordance with the Restitution of Land Act.²³¹ The Court held that the "dispossession of land amounted to racially discriminatory practices."²³² The Court further held that the Richtersveld Community had proven that they had a communal right to the land as well as the minerals and precious stones therein.²³³ In this case, although the issues related to the unfair dispossession of community land, the court interpreted section 2 (1) of the Restitution of Land Act²³⁴ which provides for the community's right to own, use and derive benefits from the land including minerals.²³⁵ After communities asserted their right to restitution of land, concerns grew that mining companies which had mining rights would enter communal land to conduct mining activities without the consent from the community.²³⁶

A root cause of conflict between mining companies and mining communities in South Africa relates to land rights.²³⁷ Land is central to the community's livelihood for crop and livestock farming as well as the use of communal land for cultural and religious practices.²³⁸ Therefore, deprivation of land is a leading contributor to conflict by.²³⁹ One of the ways to cushion the negative effect of deprivation of the use of land by communities is through consultation.²⁴⁰ The Constitutional Court has emphasised the need for meaningful consultation with communities and the protection of informal rights to land in the *Maledu*,²⁴¹ *Bengwenyama*²⁴² and *Baleni*²⁴³ cases which are discussed in this section.

²²⁹ 2004 (5) SA 460 (CC).

²³⁰ *Alexor vs Richtersveld Community* 204 (5) SA 460 (CC) para 9.

²³¹ *ibid* para 1.

²³² *ibid* para 9.

²³³ *Alexor vs Richtersveld Community* 204 (5) SA 460 (CC) para 64.

²³⁴ The long title of the Act provides that it was enacted to enforce the constitutional right to land to community and persons whose land was dispossessed as a result of past racially discriminatory laws.

²³⁵ *Alexor vs Richtersveld Community* 204 (5) SA 460 (CC) para 100.

²³⁶ *Alexor vs Richtersveld Community* 204 (5) SA 460 (CC).

²³⁷ P J Badenhorst 'Conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle?' (2011) *TSAR* 326-341.

²³⁸ Horman Chitonge 'Land Use and Rural Livelihoods in South Africa: Emerging Evidence from the Eastern Cape' (2013) 2 *Sage Journals* 1.

²³⁹ *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Limited and another (Mdumiseni Dlamini and another as amici curiae)* 2019 (1) BCLR 53.

²⁴⁰ *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Limited and another (Mdumiseni Dlamini and another as amici curiae)* 2019 (1) BCLR 53.

²⁴¹ *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Limited and another (Mdumiseni Dlamini and another as amici curiae)* 2019 (1) BCLR 53.

²⁴² *Bengwenyama-Ya-Maswazi Community and others vs Genorah Resources (Pty) Limited and others* 2011 4 SA 113 (CC).

²⁴³ *Baleni and Others vs Minister of Mineral Resources and Others* [2019] 1 ALL SA 358 GP.

In the case of *Maledu and Others vs Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*,²⁴⁴ the mining company (the respondents) were holders of a mining right to carry out mining activities over farmland which was occupied and enjoyed by the applicants.²⁴⁵ The applicant's predecessors who were members of the Lesetlheng Community, had also previously occupied and used the land.²⁴⁶ Although the applicants were not residing on the land, they utilized it for livestock grazing, farming purposes and housing the labourers at the farm.²⁴⁷ The High Court in the North West Division granted an interdict evicting and restraining the applicants from accessing the farm.²⁴⁸ The applicants approached the constitutional court seeking leave to appeal the interdict.²⁴⁹ The Constitutional Court observed that the main issues for determination related to that the mining rights granted *vis-à-vis* the applicant's right to enjoy or use the farmland.²⁵⁰ The mining company submitted that they had consulted the members of the Lesetlheng Community.²⁵¹ The mining company argued that the award of the mining right would not be affected whether or not the community granted consent.²⁵² In addition to this, the mining company argued that "a mining right enjoyed preference over the surface rights over which the mining right relates."²⁵³ The Constitutional Court held that consent must be obtained from occupiers of land who have an informal right to land.²⁵⁴ The court also emphasized that the provisions of the IPILRA should be read and interpreted harmoniously with the provisions of the MPRDA.²⁵⁵ Additionally, all persons who are likely to be affected by mining operations and reside in land held on a communal basis should participate in the consultation process.²⁵⁶ Consent will be construed to be obtained after a majority of the affected persons agree that a meaningful consultation process has been conducted.²⁵⁷

In the case of *Bengwenyama Minerals (Pty) Ltd and Others vs Genorah Resources (Pty) Ltd and Others*,²⁵⁸ the applicants challenged the grant of prospecting rights to the first respondent, Genorah Resources (Pty) Limited, hereafter referred to as the mining company.²⁵⁹ The first applicant and the mining company had applied for prospecting

²⁴⁴ 2019 (1) BCLR 53.

²⁴⁵ *Maledu and Others vs Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 para 11.

²⁴⁶ *ibid* para 10.

²⁴⁷ *ibid* para 10.

²⁴⁸ *ibid* para 3.

²⁴⁹ *ibid* para 3.

²⁵⁰ *ibid* para 39 and 40.

²⁵¹ *ibid* para 64 and 66.

²⁵² *ibid* para 64.

²⁵³ *ibid* para 64.

²⁵⁴ *ibid* para 104.

²⁵⁵ *ibid* para 106.

²⁵⁶ *ibid* para 106.

²⁵⁷ *ibid* para 106.

²⁵⁸ 2011 4 SA 113 (CC)

²⁵⁹ *Bengwenyama Minerals (Pty) Ltd and Others vs Genorah Resources (Pty) Ltd and Others* 2011 4 SA 113 (CC) para 6.

rights on the same land.²⁶⁰ The DMR granted the mining company the prospecting rights and disallowed the application by the first applicant because the mining company had applied earlier.²⁶¹

The mining company had conducted a sham consultation process.²⁶² Bengwenyama Minerals (Pty) Limited (the first applicant) approached the community for consultation and also signed an investment agreement where the community was allocated shares in the company.²⁶³ The traditional leader confirmed that the first applicant had conducted consultations.²⁶⁴ The mining company contended that it approached the community's traditional leader with the prescribed form for consultation for him to tick and sign off.²⁶⁵ The traditional leader however did not sign the form.²⁶⁶ The consultation process was therefore not conclusive and the first respondent did not conduct comprehensive consultations as provided for in the MPRDA. The Constitutional Court emphasized the need for consultation with affected and interested parties as provided for in section 10 of the MPRDA.²⁶⁷ The court held that interference of a landowner's right to use his land is avoided through consultation.²⁶⁸ Consultation should therefore be conducted in good faith.²⁶⁹ The court also held that an agreement between the applicant and the landowner referred to as a prospecting contract under common law is not provided for in the MPRDA.²⁷⁰ Therefore, consultation is a means of accommodating the landowner or lawful occupier in respect of the impact of mining on his land.

Similarly, in the case of *Baleni and Others vs Minister of Mineral Resources and Others*,²⁷¹ the applicants had informal rights to land as provided for by the IPILRA.²⁷² They were opposed to the respondent mining company being granted a right to mine on the subject land.²⁷³ The court considered the application of the requirement of consent and consultation provided for in the IPILRA and MPRDA, respectively.²⁷⁴ The court noted the requirement provided for by the MPRDA was consultation but not consent. However, in this case, consent of the mining community was required under the provisions of the IPILRA.²⁷⁵ The court upheld the applicant's petition and held that the grant of a mining right without their consent would amount to a deprivation of their right to use the land.²⁷⁶ Lastly, the court recognised that

²⁶⁰ *ibid* para 7, 8 and 9.

²⁶¹ *ibid* para 7, 8 and 9.

²⁶² *ibid* para 11.

²⁶³ *ibid* para 16.

²⁶⁴ *ibid* para 17.

²⁶⁵ *ibid* para 68.

²⁶⁶ *ibid* para 68.

²⁶⁷ *ibid* paragraph 66, 67 and 68.

²⁶⁸ *ibid* para 66.

²⁶⁹ *ibid* para 66.

²⁷⁰ *ibid* para 74.

²⁷¹ [2019] 1 ALL SA 358 GP.

²⁷² *Baleni and Others vs Minister of Mineral Resources and Others* [2019] 1 ALL SA 358 GP *ibid* para 3 and 11.

²⁷³ *ibid* para 4.

²⁷⁴ *ibid* para 33.

²⁷⁵ *ibid* para 47.

²⁷⁶ *ibid* para 76.

the requirement for consent as provided for in the international law principle of Free, Prior and Informed Consent” as opposed to mere consultation is crucial for the protection of rights of mining community.²⁷⁷

The common link in the above landmark judgments is that the courts emphasized the importance of safeguarding interested and affected parties through the process of consultation. The courts also noted that in the context of informal land rights, interested and affected parties must give their consent before a mining right is granted. Consent can be obtained by way of an agreement between the applicant and the interested parties. Fundamentally, one of the ways of obtaining this consent can be by way of a Community Development Agreement (CDA) which clusters the consultation process and socio-economic development plans by way of contract. Socio-economic development rights of the mining communities in South Africa are also safeguarded through Social and Labour Plans (SLP).

3.8. Social and Labour Plans for Promoting Socio-Economic Development

The MPRDA does not define what a Social and Labour Plan entails but the regulations to the Act provide for its objectives, submission process, and the contents thereof.²⁷⁸ The DMR published guidelines for the submission of SLPs, which sheds light on the developmental programmes which should be included in an SLP.²⁷⁹ The definition of an SLP can, therefore, be inferred from the objectives it seeks to achieve. An SLP provides the programmes a mining company will undertake to promote the socio-economic development of the people working at the mine and living in the area near the mine.²⁸⁰ It ensures that the mining company shares the economic benefits of that flow from mining.²⁸¹

An SLP is considered as one of the facets of corporate social responsibility by mining companies.²⁸² An SLP aims to ensure that mineral right holders promote employment and contribute to the socio-economic development of the mining areas.²⁸³ An applicants for a mining right is required to submit an SLP outlining the developmental programmes which they intend to undertake for the duration of the right.²⁸⁴ For the mining company to complete the prescribed SLP, it is prudent for it to conduct a social assessment. The social assessment, just like an environmental assessment will entail engaging with the community to understand what their developmental needs are and seek to bridge that gap. However, the SLP guidelines do not provide whether the mining company is required to consult with the local community during the drafting of the SLP. The tick-box requirement provided in the SLP is not beneficial to the mining community because the community is not involved in the conceptualisation of the SLP. Yet, the programmes

²⁷⁷ *ibid* para 78.

²⁷⁸ Regulation 40-46 of the MPRDA.

²⁷⁹ Guidelines for the submission of a Social and Labour Plan published on October 2010.

²⁸⁰ Guidelines for the submission of a Social and Labour Plan published on October 2010.

²⁸¹ Centre for Applied Legal Studies ‘Social and Labour Plans’ University of Witwatersrand available on <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> accessed on 9th March 2020.

²⁸² Centre for Applied Legal Studies ‘Social and Labour Plans’ University of Witwatersrand available on <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> accessed on 9th March 2020

²⁸³ Regulation 41 of the MPRDA.

²⁸⁴ Section 23 (1)(e) of the MPRDA

are intended for their benefit. The next chapter will demonstrate how Community Development Agreements are arrived at through active engagement with the community and are thus better recommended than SLPs in protecting mining community interests.

3.8.1. Amendment and Consequences of non-compliance of a Social and Labour Plan

The Regional Manager is mandated to review the SLP submitted by the applicant and recommends any amendments to be made if need be.²⁸⁵ An SLP is valid during the duration of mining operations until a closure certificate is issued.²⁸⁶ A holder of a mining right cannot amend or vary an SLP without the consent of the Minister.²⁸⁷ Indicating that the applicant must ensure that the SLP is in tandem with the financial resources budgeted for the mining company's community development projects to avoid the consequences of non-compliance. Non-compliance of an SLP can lead to cancellation or suspension of the mining right.²⁸⁸

In the case of *Mining Forum of South Africa and Another vs Minister of Mineral Resources and Others*²⁸⁹ the Minister suspended a mining right for non-compliance of the SLP. The applicants challenged the failure by the respondent mining company to implement its SLP.²⁹⁰ The applicants sought a declaration against the Minister for failure to take action against the mining company for failing to comply with its statutory obligations regarding SLPs.²⁹¹ The community had requested the DMR to take action against the mining company for non-compliance of its obligations under the SLP.²⁹² The Minister responded by suspending the mining right and thereafter conducted an audit which revealed that the mining company was behind schedule with the SLP compliance.²⁹³ In response to the suspension, the mining company submitted a working plan on the implementation of the pending projects.²⁹⁴ Further, it admitted that the non-compliance was as a result of financial crisis.²⁹⁵ The DMR considered the mining company's reasons and revoked the suspension.²⁹⁶ The case was however dismissed on an issue of procedure as the applicants had not exhausted judicial review remedies against the Minister as provided for in PAJA.²⁹⁷

²⁸⁵ Regulation 42 and 44 of the MPRDA.

²⁸⁶ Regulation 43 of the MPRDA.

²⁸⁷ Regulation 44 of the MPRDA.

²⁸⁸ Section 47 of the MPRDA.

²⁸⁹ [2019] 2 All SA 485 (NWM).

²⁹⁰ *Minister of Mineral Resources and others (Bapo Ba Mogale Unemployment Forum and another as intervening applicants* [2019] 2 All SA 485 (NWM) para 1.

²⁹¹ *ibid* para 1.

²⁹² *ibid* para 18.

²⁹³ *ibid* para 12.

²⁹⁴ *ibid* para 17.

²⁹⁵ *ibid* para 15.

²⁹⁶ *ibid* para 17.

²⁹⁷ *ibid* para 55 and 56.

3.8.2. Monitoring Compliance of a Social and Labour Plan

It is the obligation of the holder of a mining right or permit to submit an annual report to the DMR indicating the level of compliance of the SLP.²⁹⁸ Further, upon renewal of the right, the Minister must confirm that the holder of the mining right has complied with the SLP.²⁹⁹ This is problematic as the duration of a mining right is for a period not exceeding thirty years which is a long period of time for the DMR to confirm compliance of an SLP prior to renewal of the right.³⁰⁰ Additionally, the MPRDA does not provide for the consequences when a holder of a mining right fails to submit the annual SLP compliance report. The MPRDA only provides that the Minister has authority to request for any information or data regarding the mining right from the mining company³⁰¹ Further, that the Minister has power to cancel or suspend the mining right if the mining company has breached the conditions attached to the right.³⁰²

Therefore, it is evident that without the Minister scrutinizing compliance of the SLP and in absence of a filed SLP annual report, there is no effective way which the DMR and mining community can confirm that there is compliance of the SLP. In view of the foregoing, the MPRDA or DMR should provide stringent consequences, monitoring and evaluation procedures for tracking SLP compliance by the mining companies.

3.8.3. Programmes Contained in a Social and Labour Plan

An SLP contains four main programmes.³⁰³ As this dissertation focuses on mining community development, the programmes will be critiqued based on whether they contribute to mining community development. The first programme is a Human Resources Development Programme (HRDP) which provides for the development of skills, a career progression plan, an internship and bursary plan, and employment equity statistics.³⁰⁴ The HRDP ensures that the mining company complies with the objective of the MPRDA to provide meaningful opportunities to historically disadvantaged persons.³⁰⁵ The HRDP seeks to ensure that the mining community benefits from employment opportunities and skill development. However, mining communities and the labour sending areas are associated with poverty and underdevelopment.³⁰⁶ Therefore, the labour pool provided from these areas does not align with the agenda sought to be achieved by the HRDP.

²⁹⁸ section 28 (2)(c) of the MPRDA.

²⁹⁹ section 24(3)(c) of the MPRDA.

³⁰⁰ Section 23(6) of the MPRDA.

³⁰¹ Section 28 (2)(c) of the MPRDA.

³⁰² Section 47 (1)(b) of the MPRDA.

³⁰³ Regulation 46 of the MPRDA.

³⁰⁴ Regulation 46 (1)(b) of the MPRDA. After the mining right is granted, the mining company should have ten percent women participation and forty percent of historically disadvantaged South Africans in management within five years.

³⁰⁵ Section 2 of the MPRDA.

³⁰⁶ Anri Heyns 'Mining Community Development in South Africa: A critical consideration of How the Law and Development Approach the concept "Community",' (2019) 12 *Law and Development Review* 584.

The second programme is the Local Economic Development Programme (LEDP) which seeks to promote the economic growth of the mining town.³⁰⁷ The mining company must consider the main economic activities and the impact the mine would have on the local and sending communities and provide a plan on how to promote the economic activities.³⁰⁸ Under the LEDP, the mining company must also address housing and living conditions of mine employees.³⁰⁹ Additionally, the mining company should provide the infrastructure and poverty eradication projects which it intends to support would support as provided for in the Municipality Integrated Development Plan (MIDP) of the area in which the mine operates and the major sending areas.³¹⁰ The LEDP is beneficial to the mining community as it is tailor-made to aid in improving their economic livelihood.

Thirdly, the mining company should provide a programme to manage the downscaling and retrenchment which provides measures to avoid job losses and to minimise negative economic impact in the event of retrenchment upon mine closure.³¹¹ This programme focuses more on the employees of the mining company and is intended to mitigate the impact of the labour force in the event the company experiences financial constraints. The third programme is therefore not exclusively designed for mining communities but for the employees. The fourth programme is Mine Community Development which is a subject of closer scrutiny in this dissertation.

3.8.4. SLP Programme on Mine Community Development

The guidelines provide for Mine Community Development (MCD) as one of the programmes that must be included in the SLP.³¹² MCD was not previously provided for under the Regulations to the MPRDA. This lacuna should therefore be addressed and amendments be made to reflect the provisions of the guidelines. The definition of mining community has been narrowed down in these guidelines. The guidelines provide that mining community “refers to communities where mining takes place and labour sending areas.”³¹³ This definition is comprehensive and aligns with the objectives of an SLP as compared to the broad definition of a community under the MPRDA.³¹⁴

The objective of MCD is to ensure that mining companies comply with the principles of social license to operate.³¹⁵ While conceptualising the MCD plan, mining companies are required to consider the programmes which the Municipality Integrated Development Plan (IDPs) has provided for.³¹⁶ Additionally, the guidelines provide that previously

³⁰⁷ Regulation 46 (c)(i) of the MPRDA.

³⁰⁸ Regulation 46 (c)(i) of the MPRDA.

³⁰⁹ Regulation 46 (c)(i) of the MPRDA.

³¹⁰ Regulation 46 (c)(iii) of the MPRDA.

³¹¹ Regulation 46 (e)(i) of the MPRDA.

³¹² Clause 3 of the DMR SLP Guidelines.

³¹³ Definition of the DMR SLP Guidelines page 17.

³¹⁴ The MPRDA defines community as persons who exercise communal rights and where negotiation or consultation is required in the Act, community refers to persons directly affected by mining on land which they occupy.

³¹⁵ DMR guidelines page 17.

³¹⁶ DMR guidelines page 17.

formulated national frameworks which focus on socio-economic development should be considered while drafting the MCD plan.³¹⁷ For example, the Provincial Growth and Development Strategy (PGDS) and the National Spatial Development Strategy (NSDS).³¹⁸ The MCD is beneficial to mining communities as it focuses on programmes which promote their socio-economic development. The DMR also tasks the mining company with the obligation to identify the main economic activities of the community. Further, the foreseeable negative impacts that the mining operation would cause on the community should also be identified.³¹⁹ For example, relocation from community land to pave the way for mining operations, degradation of land used for agricultural purposes, and the growth of informal settlement where mine labourers reside.³²⁰ The guidelines further provide that any initiative taken by the mining company to address the negative impacts of mining should not be regarded as an MCD project.³²¹ Rather, the mining company should address the negative impacts through mechanisms provided for in the legislature.³²² For example, environmental degradation should be addressed through the environmental programme.³²³

In conclusion, the programmes contained in SLPs seek to address some of the fundamental challenges faced by mining communities. The formulation, implementation and monitoring of SLPs is crucial in achieving the intended mandate.³²⁴ Presently, the shortfalls of SLPs are as follows. First, during the formulation of the SLP programmes, there is lack of proper consultations conducted with the main stakeholder being the mining community.³²⁵ Therefore, public participation by the community is necessary to ensure there is both transparency and provision of sustainable programmes which shall be beneficial to the community.³²⁶ Secondly, the SLP and the reports submitted annually to the DMR are not published.³²⁷ Therefore, the SLPs are not easily accessible by the members of the public and

³¹⁷ DMR guidelines page 17

³¹⁸ DMR guidelines page 17

³¹⁹ DMR guidelines page 17

³²⁰ DMR guidelines page 17; Mritunjoy Sengupta *Environmental impacts of mining: Monitoring, Restoration and Control* (1993) Ch 1.

³²¹ DMR guidelines page 17.

³²² DMR guidelines page 17.

³²³ Environmental programme is provided for in Chapter 5 of the National Environmental Management Act, 1998

³²⁴ Amnesty International 'Smoke and Mirrors: Lonmin's Failure To Address Housing Conditions at Marikana' (2015) at ch.7 available at <https://www.amnesty.org.nz/sites/default/files/AmnestyInternationalLonminfailureaddresshousingMarikana.pdf> accessed on 10th June 2020.

³²⁵ Amnesty International 'Smoke and Mirrors: Lonmin's Failure To Address Housing Conditions at Marikana' (2015) at ch.7 available at <https://www.amnesty.org.nz/sites/default/files/AmnestyInternationalLonminfailureaddresshousingMarikana.pdf> accessed on 10th June 2020, Centre for Applied Legal Studies (CALS) 'Social and Labour Plans First Report Trends and Analysis' (2016) at 59 available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/2017.pdf> accessed on 10th June 2020.

³²⁶ Amnesty International 'Smoke and Mirrors: Lonmin's Failure To Address Housing Conditions at Marikana' (2015) at ch.7 available at <https://www.amnesty.org.nz/sites/default/files/AmnestyInternationalLonminfailureaddresshousingMarikana.pdf> accessed on 10th June 2020.

³²⁷ Amnesty International 'Smoke and Mirrors: Lonmin's Failure To Address Housing Conditions at Marikana' (2015) at ch.7 available at <https://www.amnesty.org.nz/sites/default/files/AmnestyInternationalLonminfailureaddresshousingMarikana.pdf> accessed on 10th June 2020.

interested stakeholders who are keen on monitoring the programme implementation progress.³²⁸ In a nutshell, mining communities should be accorded an opportunity to participate in the formulation, implementation and monitoring of SLPs to ensure their interests are safeguarded.³²⁹

3.9. Mining Charter on Broad-Based Socio-Economic Empowerment

The MPRDA provides for the development of a broad-based socio-economic Charter to give effect to the objectives of the Constitution and MPRDA on the advancement of meaningful participation of HDSA.³³⁰ The Broad-Based Black Economic Empowerment Act³³¹ provides the legislative framework for the implementation of BBBEE provisions. To date, three Mining Charters have been published.³³² The current Mining Charter was published in 2018. The 2018 Charter provides amendments to improve the 2004 and 2010 Charters.³³³ A thorough assessment of the 2004 and 2010 charter was undertaken in the year 2009 and 2014, respectively with a view of considering the success of the implementation.³³⁴ The Mining Charter 2018³³⁵ was published in response to the gaps in the Mining Charter 2010 and to give effect to section 9 of the Constitution and section 100(2)(a) of the MPRDA.

Broadly, the 2018 Charter provides for BEE ownership, equity in beneficiation and local content, human resources development, employment equity, mine community development and improvement of housing conditions. The Charter provides a range of objectives which a mining company must meet. This section provides the scope of the provisions relating to mining communities. The charter defines a host community as “a community within a local or metropolitan municipality adjacent to the mining area.”³³⁶ This definition provides a territorial limit to the area in which the scope of the responsibility of the mining company to the community extends. The minimum shareholding for black economic empowerment (BEE) is thirty per cent for new mining rights and twenty-six per cent for existing rights.³³⁷ The

³²⁸ Centre for Applied Legal Studies (CALS) ‘Social and Labour Plans First Report Trends and Analysis’ (2016) at 59 available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/2017.pdf> accessed on 10th June 2020.

³²⁹ Centre for Applied Legal Studies (CALS) ‘Social and Labour Plans First Report Trends and Analysis’ (2016) at 60 available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/2017.pdf> accessed on 20th June 2020.

³³⁰ Section 100 (2)(a) of the MPRDA. The Charter gives effect to the objects in section 2(c), (d), (e), (f) and (i).

³³¹ Act 53 of 2003

³³² Heyns, A and H. Mostert Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty (2018) 11 Law and Development Review.

³³³ Department of Mineral Resources ‘Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018’ published by Gazette Notice No.41934

³³⁴ Department of Mineral Resources ‘Assessment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter)’ May, 2015.

³³⁵ Published by Minister of Mineral Resources Samson Gwede Mantashe on 27th September 2018 titled ‘ Broad Based Socio-Economic Empowerment Charter For the Mining and Minerals Industry, 2018 available [on https://www.gov.za/sites/default/files/gcis_document/201806/41714gon611.pdf](https://www.gov.za/sites/default/files/gcis_document/201806/41714gon611.pdf) accessed on 18th February 2020.

³³⁶ Definitions, Mining Charter.

³³⁷ Clause 2.1.1 and clause 2.1.3.1 of the Mining Charter.

charter promotes socio-economic development as it provides for host communities to benefit from ownership of mining companies through equity of five per cent equivalent of the issued share capital.³³⁸ The shares are allotted to a Trust or an entity established that is equivalent of a Trust.³³⁹ The Trust model ensures resource mobilisation by communities and governance of the Trust is provided for by the trustees.³⁴⁰ Representation of the Trust ought to include the host community, traditional authorities and Community Based Organisations.³⁴¹ The mining company must consult the municipality and traditional authority to identify the host community development needs, which is funded through the Trust.³⁴²

The 2018 Charter also provides for the SLP Mine Community Development.³⁴³ The provisions on mine community development in the Charter are similar to the provisions in the SLP guidelines.³⁴⁴ The additional provisions in the Charter emphasize on the implementation of SLPs.³⁴⁵ Firstly, the SLP should be fully implemented within the financial year of the mining company.³⁴⁶ Secondly, that mining companies operating in the same area can enhance socio-economic development through collaboration identified projects, therefore jointly factoring in the interests and needs of mining communities.³⁴⁷ The guidelines also provide that an annual compliance report should be filed to enable the DMR to monitor compliance.³⁴⁸ The BBBEE Act provides for a scorecard to measure compliance on whether businesses have complied with BEE requirement.³⁴⁹ Other than providing for a rating module for mining companies to be rated in terms of BEE compliance, the guidelines and BEE Act should provide for enforcement of stricter measures to censure non-compliance.³⁵⁰ For example, to empower the Minister to cancel or suspend the mining right in the event of a breach of a fundamental condition to the right.³⁵¹

3.10. Conclusion

This Chapter discussed the legislative provisions in the mining regulatory framework in South Africa which contribute to the socio-economic development of mining communities. The MPRDA provides the legislative framework which is

³³⁸ Clause 2.1.4.1.1 of the Mining Charter.

³³⁹ Clause 2.1.4.1.2 of the Mining Charter.

³⁴⁰ Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 65.

³⁴¹ Clause 2.1.4.1.3 of the Mining Charter; Sethulego Matebesi *Social Licensing and Mining in South Africa* (2020) 66.

³⁴² Clause 2.1.4.1.4 of the Mining Charter.

³⁴³ Clause 2.5 of the Mining Charter.

³⁴⁴ Clause 2.5.2 of the Mining Charter.

³⁴⁵ Clause 2.5.3 of the Mining Charter.

³⁴⁶ Clause 2.5.3 of the Mining Charter.

³⁴⁷ Clause 2.5.2 of the Mining Charter.

³⁴⁸ Clause 10.1.1 of the Mining Charter.

³⁴⁹ Section 9 of the BBBEE Act; Henk Klopper 'Driving Corporate Social Responsibility through Black Economic Empowerment' (2014) 18 *Law, Democracy & Development* 64.

³⁵⁰ Henk Klopper 'Driving Corporate Social Responsibility through Black Economic Empowerment' (2014) 18 *Law, Democracy & Development* 77.

³⁵¹ Section 47 of the MPRDA.

further elaborated through regulations to the MPRDA and guidelines developed by the DMR. The shortcomings of the framework are addressed hereunder.

First, consultation³⁵² with interested and affected parties is a progressive provision in the MPRDA, but the provision should incorporate the requirement for consent by mining communities prior to the grant of a mining right.³⁵³ With this, the spirit of the principle of Free, Prior, and Informed Consent will be achieved. The Constitutional Court stamped its authority in the landmark judgments discussed above in holding that applicants for a mining right must seek not only to consult with the mining communities but also seek their consent.³⁵⁴ The onus to conduct meaningful consultation lies with the applicant who must identify the mining community and conduct consultations.³⁵⁵ The framework does not provide that the Regional Manager can provide technical support to a mining company by assisting it in identifying the mining community to carry out consultations with. The framework does not provide that the mining community should endorse its signature to confirm the contents of the consultation report prepared by the mining company. Additionally, the framework should provide that the consultation process be conducted in the community's native language and the report be made publicly available both to the mining community and on the DMR's website. Secondly, the drafting of Social and Labour Plans falls short on the participatory approach with mining communities. The legislative framework³⁵⁶ does not provide for public participation with the intended beneficiaries of the SLP programme during the drafting of the SLP. Additionally, the framework does not provide for the publication of the SLP, therefore making its accessibility a challenge. Further, as SLPs are considered long term development plans, the annual report submitted by the mining company ought to be made publicly available. This will enable ease of scrutiny by the mining community and any stakeholders keen on monitoring the developmental progress. The framework should also provide a clear consultation guideline with the municipality as the SLP and municipality IDP should be read in harmony. Therefore, the framework should reconsider ways in which to achieve a transparent and inclusive process of formulation, implementation, monitoring and evaluation.

Thirdly, the Mining Charter seeks to ensure that the economic benefits from mining trickle down to historically disadvantaged South Africans.³⁵⁷ Mine Community Development Programme under the Mining Charter promotes the socio-economic development of mining communities; however, there is need for clear monitoring and evaluation procedures. The framework ought to provide that an annual compliance report on Mine Community Development Programme should be submitted to the DMR. In addition, the legislative framework should provide for strict

³⁵² Section 10 MPRDA.

³⁵³ Section 10 MPRDA; *Baleni and Others vs Minister of Mineral Resources and Others* [2019] 1 ALL SA 358 GP.

³⁵⁴ *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Limited and another (Mdumiseni Dlamini and another as amici curiae)* [2018] JOL 40523 (CC), *Bengwenyama-Ya-Maswazi Community and others vs Genorah Resources (Pty) Limited and others* [2014] JOL 32357 (SCA) and *Baleni and Others vs Minister of Mineral Resources and Others* [2019] 1 ALL SA 358 GP.

³⁵⁵ Clause G (1) of the Guideline for Consultation with Communities and Interested and Affected Parties.

³⁵⁶ MPRDA, Regulations to the MPRDA and Guidelines for SLPs.

³⁵⁷ Section 100 of the MPRDA.

consequences for non-compliance to hold the mining company more accountable. For example, cancellation and suspension of the mining right.³⁵⁸

One way of achieving Free Prior and Informed Consent and addressing the aforementioned shortcomings of existing measures in the mining regulatory framework in South Africa is by way of a Community Development Agreement which shall be discussed in the next Chapter.³⁵⁹ The agreement not only ensures that the mining community consents to the mining operation but also provides consensus on the developmental projects to be implemented by the mining company.³⁶⁰

³⁵⁸ Section 47 of the MPRDA.

³⁵⁹ Jennifer Loutit, Jacqueline Mandelbaum & Sam Szoke-Burke 'Emerging Practices in Community Development Agreements' 2016 *Columbia Center on Sustainable Investment* 6.

³⁶⁰ Jennifer Loutit, Jacqueline Mandelbaum & Sam Szoke-Burke 'Emerging Practices in Community Development Agreements' 2016 *Columbia Center on Sustainable Investment* 6.

Chapter Four: Community Development Agreements in Safeguarding Mining Community Rights - Lessons from Kenya's Mining Law

4.1. Introduction

The finite nature of mineral resources³⁶¹ and its availability is a factor which contributes to the lifespan of mining operations.³⁶² Therefore, the need to achieve equitable and sustainable distribution of mineral-recourse benefits between all mining stakeholders, including mining communities, cannot be overlooked.³⁶³ Studies show that governments and mining companies acknowledge that communities in mining areas usually bear the environmental and social costs of mining operations.³⁶⁴ Therefore, countries rich in mineral resources are continuously encouraged to adopt legislative measures³⁶⁵ which provide for inclusive and sustainable management of mineral resources.³⁶⁶

One possible measure to achieve this is by way of a Community Development Agreement (CDA) model. A CDA is signed by the mining community and the holder of a mining licence. A CDA is one of the most recommended models used to safeguard the rights of mining communities.³⁶⁷ Broadly, CDAs are legally enforceable contracts which provide development programmes for holders of a mining license to implement for the benefit of the mining community.³⁶⁸ A CDA is narrowly be defined as “a legally binding contract between the holder of a mining right and a community that will be affected by the mining operations and addresses issues relating to community development.”³⁶⁹ It explicitly stipulates the socio-economic development expectations which the government and local community have from the mining company.

³⁶¹ World Bank Report 'Mining Community Development Agreements – Practical Experiences and Field Studies' (2010) at 8 available at <http://documents.worldbank.org/curated/ReportFINAL.pdf> accessed on 22nd April 2020.

³⁶² James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 673.

³⁶³ World Bank Report 'Mining Community Development Agreements – Practical Experiences and Field Studies' (2010) at 9 available at <http://documents.worldbank.org/curated/ReportFINAL.pdf> accessed on 22nd April 2020. The mining company, community and government are the main stakeholders in mining, See M Nakagawa, M, K Bahr & D Levy 'Scientific understanding of stakeholders' behavior in mining community' *Environment Development Sustainability* 15, 500 (2013).

³⁶⁴ O'Faircheallaigh 'Community Development Agreements in The Mining Industry: An Emerging Global Phenomenon' (2013) 44 *Community Development* 224.

³⁶⁵ For example; Regulations to the primary mining legislation on how the CDA will be negotiated and implemented.

³⁶⁶ Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development* (2018) 3.

³⁶⁷ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 673.

³⁶⁸ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 674.

³⁶⁹ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of resources as a Driver of Sustainable Development*, (2018) 674.

Kenya recently enacted a new mining statute which requires the holder of a mining license to sign a CDA with mining communities.³⁷⁰ This chapter discusses Kenya's mining regulatory approach, which provides for CDAs in line with internationally recommended best practices. The success of the implementation of CDAs in Kenya has been experienced in Kwale County, located in the coastal region.³⁷¹ Base Titanium, a mining company dealing with the mining of titanium in Kwale County, incorporated the use of CDAs in community development programmes through the construction of agricultural training facilities.³⁷² The advantages and drawbacks of using CDAs will also be expounded in this Chapter.

4.2. Community Development Agreements as International Best Practice

The growing necessity to achieve equitable sharing of benefits from mineral resources has contributed to the need for CDAs in the mining industry globally.³⁷³ Noticeably, the glaring lack of equitable sharing of benefits which accrue from mineral resources has led to the global adoption of legalisation geared towards guaranteeing mineral resource benefits for mining communities.³⁷⁴ For example, Canada, Peru, Ghana and Kenya have incorporated the use of CDAs in their mining statutes.³⁷⁵

Since mid-1980s, International Financial Institutions have contributed to the development of policy and legal reforms in the mining sector.³⁷⁶ Campbell³⁷⁷ notes that the World Bank has contributed to the reform of mining regimes in Africa through research projects which subsequently yield recommendations for adoption.³⁷⁸ For example, the World Bank published a paper in 1992 titled 'Strategy for Mining in Africa' recommending the privatisation of the mining sector in African countries to ensure better management of profits in exploitation and production.³⁷⁹ Heynes³⁸⁰ in

³⁷⁰ The Mining Act and CDA Regulations are available on [http://kenyalaw.org:8181/exist/kenyalex/No. 12 of 2016](http://kenyalaw.org:8181/exist/kenyalex/No.12of2016) accessed on 24th April 2020.

³⁷¹ Base Titanium 'Community Infrastructure' available at <http://basetitanium.com/community/community-programmes/community-infrastructure> accessed on 10th June 2020.

³⁷² Base Titanium 'Community Infrastructure' available at <http://basetitanium.com/community/community-programmes/community-infrastructure> accessed on 10th June 2020.

³⁷³ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 674. CDAs are also referred to as Benefit Sharing Agreements.

³⁷⁴ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 674.

³⁷⁵ Jennifer Loutit, Jacqueline Mandelbaum & Sam Szoke-Burke 'Emerging Practices in Community Development Agreements' (2016) *Columbia Center on Sustainable Investment* 1.

³⁷⁶ Tracy-Lynn Field *State Governance of Mining Development and Sustainability* 2019.

³⁷⁷ Bonnie Campbell 'Revisiting the Reform Process of African Mining Regimes' *Canadian Journal of Development Studies* 30, 1-2 (2010) 197-217.

³⁷⁸ Bonnie Campbell 'Revisiting the Reform Process of African Mining Regimes' *Canadian Journal of Development Studies* 30, 1-2 (2010) 198.

³⁷⁹ Bonnie Campbell 'Revisiting the Reform Process of African Mining Regimes' *Canadian Journal of Development Studies* 30, 1-2 (2010) 200.

³⁸⁰ Anri Heyns 'Mining Community Development in South Africa: A critical consideration of How the Law and Development Approach the concept "Community"' (2019) 12 *Law and Development Review* 585.

demystifying the concept of community' in development notes that "the origins of empowerment policies in South Africa are seated in global development theory ad context."³⁸¹

Similarly, in this instance, the World Bank³⁸² carried out a research and recommended the use of Community Development Agreements. The World Bank and the International Council of Mining and Metals first began by carrying out research projects which focused on benefit sharing and public participation during the different stages of a mining project.³⁸³ The World Bank thereafter developed a Mining Community Development Agreement toolkit in March 2012, which provides for the structure of CDAs and the roles of the government and mining company in fostering social responsibility in mining.³⁸⁴

Thereafter the World Bank recommendation on CDAs, scholars for instance Otto,³⁸⁵ O'Faircheallaigh,³⁸⁶ and Nwapi³⁸⁷ delved into research on the structure, implementation, pros and challenges of the model which shall be discussed further in this Chapter.

The African Mining Vision was adopted in 2009 with the mission of advocating for transparency, equitable and optimal exploitation of mineral resources in Africa.³⁸⁸ The AMV focuses on development of the extractives industries as well as the mitigation and management of adverse impacts of mining by advocating for mining companies to be environmentally and socially responsible.³⁸⁹ Further, the policy by AMV considers that public participation through environment and social impact assessments is useful in evaluating the adverse impacts of mining in a particular area.³⁹⁰ It further seeks to ensure that mining communities benefit positively from mining activities.³⁹¹ It is imperative to note

³⁸¹Anri Heyns 'Mining Community Development in South Africa: A critical consideration of How the Law and Development Approach the concept "Community"' (2019) 12 *Law and Development Review* 589.

³⁸² Mendes Pereira, João Márcio 'The World Bank as a Political, Intellectual, and Financial Actor (1944-1994)' 5 (2017) *Relaciones internacionales* (La Plata, Argentina) 74 notes that the World Bank is an institution which influences political and economic ideas and concepts globally.

³⁸³ Bulletin 5 on the African Mining Vision 'Mining in Africa: Managing the Impacts' available on http://www.africaminingvision.org/amv_resources/ISGbulletin5.pdf accessed on 20th April 2020.

³⁸⁴ World Bank 'Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)' (June 2010) at 62 available at <http://documents.worldbank.org/curated/Report0June02010.pdf> accessed 17th April 2020.

³⁸⁵ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 673.

³⁸⁶ Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 *Journal of Business Ethics* 92.

³⁸⁷ Chilenye Nwapi 'Legal and institutional frameworks for community development agreements in the mining sector in Africa' (2017) *The Extractive Industries and Society* 4 at 203.

³⁸⁸ The African Union Commission 'The Africa Mining Vision' (2009) 1 available on <http://www.africaminingvision.org/> accessed on 20th April 2020. Kojo Busia & Charles Akong 'The African Mining Vision : Perspectives on Mineral Resource Development in Africa' *Journal of Sustainable Development Law and Policy* 8 (2017) 146.

³⁸⁹ African Mining Vision available on <http://www.africaminingvision.org/> accessed on 20th April 2020.

³⁹⁰ Bulletin 5 on the African Mining Vision 'Mining in Africa: Managing the Impacts' available on http://www.africaminingvision.org/amv_resources/ISGbulletin5.pdf accessed on 20th April 2020.

³⁹¹ Bulletin 5 on the African Mining Vision 'Mining in Africa: Managing the Impacts' available on http://www.africaminingvision.org/amv_resources/ISGbulletin5.pdf accessed on 20th April 2020.

that although the AMV does not provide for use of CDAs, its policy advocates that the practice of social responsibility by mining companies should extend to mining communities.³⁹²

4.3. Binding nature of Community Development Agreements

Contractual agreements between mining companies and communities are considered powerful mechanisms which ensure the benefits of the mineral resource benefits are shared, and negative impacts of mining on the community are mitigated.³⁹³ CDAs do not replace CSR initiatives by mining companies but provide a contractual obligation for community development.³⁹⁴ The CDA model is preferred to CSR because of the latter's discretionary nature, whereby mining companies voluntarily carry out community development initiatives.³⁹⁵ CDAs are therefore designed to ensure that the proceeds of mineral resources are shared with surrounding communities based on legally enforceable contractual commitments instead of relying on the voluntary CSR budgets of mining licence holders.³⁹⁶ Further, CDAs cushion the mining licence holders from potential (and usually common) disputes with communities that disrupt operations, increase project risks and stretch project costs.³⁹⁷ Another advantage CDAs is that the parties' expectations are crystallized in a contract prior to the commencement of mining operations.³⁹⁸

The approach used by various governments in ensuring mining companies comply with community development requirements is either codified in legislation or is dependent on the voluntary initiative of a mining company.³⁹⁹ It is difficult to scrutinise a 'promise made' by the mining company to carry out development projects or hold the mining company accountable when it fails to deliver the pledged community projects. On the other hand, the voluntary approach is beneficial to the mining company because the company can implement the projects at its own pace and depending on the availability of financial resources.

³⁹² Bulletin 5 on the African Mining Vision 'Mining in Africa: Managing the Impacts' available on http://www.africaminingvision.org/amv_resources/ISGbulletin5.pdf accessed on 20th April 2020.

³⁹³ Kristi Disney Bruckner 'Community Development Agreements in Mining Projects' (2016) 44 Denver Journal of International Law & Policy 413; Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 Journal of Business Ethics 92.

³⁹⁴ Kristi Disney Bruckner 'Community Development Agreements in Mining Projects' (2016) 44 Denver Journal of International Law & Policy 414; Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 Journal of Business Ethics 92.

³⁹⁵ Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 Journal of Business Ethics 92.

³⁹⁶ Kristi Disney Bruckner 'Community Development Agreements in Mining Projects' (2016) 44 Denver Journal of International Law & Policy 413; Chilenye Nwapi 'Legal and institutional frameworks for community development agreements in the mining sector in Africa' (2017) *The Extractive Industries and Society* 4 at 203.

³⁹⁷ World Bank 'Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)' (June 2010) at 62 available at <http://documents.worldbank.org/curated/Report0June02010.pdf> accessed 14th April 2020.

³⁹⁸ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 673.

³⁹⁹ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of resources as a driver of sustainable development*, (2018) 677.

The regulatory approach is reflected in state mining agreements or in CDAs.⁴⁰⁰ State Mining agreements are signed by the State and the holder of a mining license and provide the general obligations of the latter in aspects relating to the protection of the environment, compliance with labour laws and benefit-sharing.⁴⁰¹ On the other hand, CDAs provide the holder of a mining right with specific obligations on the sharing of economic benefits brought about by mining through community development.⁴⁰²

In Kenya, the Mining (Community Development Agreement) Regulations, 2016⁴⁰³ provides the guidelines for the CDAs. These regulations are progressive as they protect by way of legislation, the interests of both the government, the holder of the mining right and the community.

4.4. Kenya's Mining Act

Kenya's Mining Act⁴⁰⁴ (the Mining Act) replaced the previous Mining Act Chapter 306 Laws of Kenya.⁴⁰⁵ The repealed Mining Act was a 1987 legislation which required modernisation and alignment with the provisions of Article 69 of Constitution of Kenya, 2010 (the Constitution). Article 69 of the Constitution obligates the state to "ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits."⁴⁰⁶ Mineral resources are included in the natural resource's category by the Constitution.⁴⁰⁷

The long title of the Mining Act provides that 'the intent of the legislation is to give effect to the provisions of the Constitution which promote the transparent, sustainable and equitable development of natural resources.'⁴⁰⁸ Additionally, the Mining Act aims at giving effect to the state's constitutional duty to ensure equitable sharing of the benefits accruing from mineral resources.⁴⁰⁹ The Director of Mines⁴¹⁰ is mandated to develop policies which ensure compliance of international and national conventions relating to local community development.⁴¹¹ The Mining Act

⁴⁰⁰ Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 Journal of Business Ethics 92.

⁴⁰¹ Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 Journal of Business Ethics 92.

⁴⁰² Carian O'Faircheallaigh 'Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements' (2015) 132 Journal of Business Ethics 92.

⁴⁰³ The CDA Regulations is a subsidiary legislation to the Mining Act is available on <http://kenyalaw.org/2016> accessed on 24th April 2020.

⁴⁰⁴ Act No. 12 of 2016.

⁴⁰⁵ The Mining Act is available on <http://kenyalaw.org/2016> accessed on 24th April 2020.

⁴⁰⁶ Article 69 (1)(a) of the Constitution of Kenya, 2010 available at <http://kenyalaw.org/kl/index 398> accessed on 24th April 2020.

⁴⁰⁷ Article 260 of the Constitution of Kenya, 2010.

⁴⁰⁸ The long title provides for Article 60 of the Constitution which emphasises on the equitable access to land, Article 62 (1)(f), Article 66(2), Article 69 and Article 71.

⁴⁰⁹ Long title of the Mining Act.

⁴¹⁰ Established under section 18 of the Mining Act.

⁴¹¹ Section 20 (1)(o) of the Mining Act.

underscores this by providing for community development as a pre-condition to the award of a mineral right.⁴¹² To this end, the Mining Act provides that a holder of a mining licence must sign a community development agreement (CDA) with the community or communities where mining operations are to be carried out.⁴¹³

4.5. Background to Community Development Agreements in Kenya

The concept of CDAs was alien in Kenya's mining regulatory system and was only introduced in 2016 by subsidiary legislation in the Mining Act. The Mining Act defines a CDA as "an agreement entered into between a large-scale mining licence holder and a community."⁴¹⁴ An applicant for a mineral right seeking to prospect or exploit minerals situated in land owned by a community must obtain consent from the relevant community land management committee.⁴¹⁵ Therefore, during the application stage, the mining company is only required to obtain consent from the community committee. A CDA is thereafter signed with the community after the mining license has been granted. A mining company cannot commence operations without signing the contract. A CDA saves the applicant time and resources during the license application stage as the comprehensive consultation process including negotiation of the CDA is only carried out mining companies which have been awarded a license.

A community is defined under the Mining Act as "a group of people living around an exploration and mining operations area or a group of people who may be displaced from land intended for exploration and mining operations."⁴¹⁶ This definition of a community emphasises on a fair and objective identification of the mining community.⁴¹⁷

The drivers of CDAs are: first that mineral resource benefits be shared between the mineral rights holder and the community.⁴¹⁸ Secondly, that mining does not adversely interfere with the economic, social and cultural practices of the community.⁴¹⁹ Thirdly, that mining 'significantly contributes to the improved economic, social and cultural wellbeing of the community'.⁴²⁰ Fourthly, that there is accountability and transparency in mining-related community

⁴¹² Section 42 (1)(c) of the Mining Act.

⁴¹³ Section 109 (a)(i) of the Mining Act. The Cabinet Secretary for Ministry of Petroleum and Mining (Mining CS) published the Mining (Community Development Agreement) Regulations, 2017 (the CDA Regulations).

⁴¹⁴ Section 4 of the Mining Act. A mining permit authorises the holder to carry out small scale mining operations while a mining license is for large scale operations.

⁴¹⁵ Section 38 of the Mining Act; the National Land Commission is an independent constitutional body that is responsible for managing public land on behalf of the national and county governments, in accordance with Article 67 of the Constitution. The Committee is established either under the Community Land Act (No. 27 of 2016) or the National Land Commission where community land that is not registered.

⁴¹⁶ Section 4 of the Mining Act.

⁴¹⁷ World Bank Report 'Mining Community Development Agreements – Practical Experiences and Field Studies' (2010) at 78-80 available at <http://documents.worldbank.org/curated/Report/FINAL.pdf> accessed on 22nd April 2020.

⁴¹⁸ World Bank 'Mining Community Development Agreements Source Book'(2012) at 24 available at [/http://documents.worldbank.org/curated/pdf](http://documents.worldbank.org/curated/pdf) accessed on 25th April 2020; Chilenye Nwapi 'Legal and institutional frameworks for community development agreements in the mining sector in Africa' (2017) *The Extractive Industries and Society* 4 at 203.

⁴¹⁹ Regulation 9 of the CDA Regulations.

⁴²⁰ Regulation 9 of the CDA Regulations.

development.⁴²¹ These provisions ensure that the mining companies consider the interests of the community prior to the commencement of mining operations.

4.6. The Community Development Agreement Framework

Although the requirement for CDAs is derived from the constitutional obligation of the state to “ensure the equitable sharing of the accruing benefits.”⁴²² It is imperative to note that this is the approach recommended in community-level engagements with mining licence holders globally.⁴²³ The CDA Regulations mirror the model regulations published by the World Bank in 2010 (Model CDA Regulations).⁴²⁴ In some instances, the provisions are substantially similar. A CDA should provide for the following issues.

4.6.1. Identification of the Mining Community as a Party in the Community Development Agreement

The CDA regulations provide the legal requirement for a holder of a mining licence to negotiate and sign an agreement with the mining community.⁴²⁵ The holder of the mining license must identify the mining communities that are likely to be directly affected by the mining activities when it conducts the environmental and social impact assessment.⁴²⁶ The holder of the mining licence notifies the identified mining communities seven days after the grant of the license.⁴²⁷ Therefore, prior to granting of the mining license, an applicant requires to demonstrate that it has carried out an assessment and identified the mining communities. The holder of the mining license must notify the community in writing of its intention to sign a CDA within 30 days of the grant of a mining license.⁴²⁸

The MPRDA provides that the procedure of identifying and consulting with interested and affected parties conducted is within 14 days after the lodging of an application for a prospecting or mining right.⁴²⁹ Granting the interested and affected parties an opportunity to participate in the consultation process and object if aggrieved prior to the mining right being granted. The CDA negotiation process contrasts with the provisions in the MPRDA in that Social

⁴²¹ Regulation 5 (1) of the CDA Regulations.

⁴²² Article 69 (1)(a) of the Constitution of Kenya, 2019.

⁴²³ World Bank ‘Mining Community Development Agreements Source Book’(2012) at 24 available at [/http://documents.worldbank.org/curated/pdf](http://documents.worldbank.org/curated/pdf) accessed on 25th April 2020.

⁴²⁴ World Bank ‘Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)’ (June 2010) at 62 available at <http://documents.worldbank.org/curated/Report0June02010.pdf> accessed 14th April 2020.

⁴²⁵ Regulation 4(1) of the CDA Regulations.

⁴²⁶ Regulation 5(1) of the CDA Regulations.

⁴²⁷ Regulation 5(2) of the CDA Regulations.

⁴²⁸ Regulation 5(2) of the CDA Regulations. A copy of the notification is sent to the Cabinet Secretary for mining.

⁴²⁹ Section 10 of the MPRDA.

and Labour Plan must be submitted before a mining or production right is granted.⁴³⁰ In South Africa, an applicant for a mining right must demonstrate the community programmes it intends to implement before the mining right is issued.⁴³¹

According to the CDA regulations, a community that has not been identified as a party in the CDA may notify the holder of the mining licence.⁴³² To ascertain whether the community should be included in the CDA, the holder of the mining license notifies the Cabinet Secretary for Mining.⁴³³ The Cabinet Secretary for Mining thereafter consults with the local county government and the environmental agency and advises the license holder on whether the community should be a party.⁴³⁴ This provision ensures that no mining communities is left out during the drafting of the agreement.

4.6.2. Committee Representatives, Consultation and Negotiation of the Community Development Agreement with the Community

A CDA committee is mandated to negotiate and monitor the implementation of a CDA in trust for and on behalf of the community.⁴³⁵ There is inclusivity in the representation of the members of the committee as it is composed of stakeholders who are most likely to be directly affected by the mining project.⁴³⁶ The committee members include representatives from the county/federal and national government, the mining licence holder and elected county assembly leaders.⁴³⁷ Two recognized village elders, elected youth and women representatives, one NGO representative and two elected representatives from marginalised groups and disabled people are also committee members.⁴³⁸ The committee provides a platform for the community to discuss development projects which should be prioritised.⁴³⁹ Further, the committee facilitates continuous engagement between the mining company and the community which is crucial in minimising conflict that may arise in the course of the mining operations.⁴⁴⁰ The committee is also tasked with the role of settling disputes which may arise between parties to the CDA.⁴⁴¹ Therefore providing an

⁴³⁰ Regulation 42(1) of the MPRDA and Part A of the Guidelines for the submission of a Social and Labour Plan.

⁴³¹ Regulation 41 of the MPRDA.

⁴³² Regulation 5(3) of the MPRDA Regulations.

⁴³³ Regulation 5 (3) of the CDA Regulations. The position of the Cabinet Secretary for mining is equivalent to the Minister for Mineral Resources in South Africa.

⁴³⁴ Regulation 5 (5) of the CDA Regulations.

⁴³⁵ Regulation 6(a) of the CDA regulations. Regulation 5(4) provides that the CDA committee's term is three years with an equivalent renewal term.

⁴³⁶ Kristi Disney Bruckner 'Community Development Agreements in Mining Projects' (2016) 44 Denver Journal of International Law & Policy 425.

⁴³⁷ Regulation 7(1) of the CDA Regulations.

⁴³⁸ Regulation 7 (1) of the CDA Regulations.

⁴³⁹ Regulation 7 (4)(b) of the CDA Regulations.

⁴⁴⁰ Regulation 7 (4)(c) of the CDA Regulations.

⁴⁴¹ Regulation 7 (4)(d) of the CDA Regulations.

accessible avenue to address any grievances or concerns. This is beneficial to the mining community members who are often the disadvantaged party.⁴⁴²

The committee must develop an agenda and schedule of issues to be discussed during the negotiation of the CDA.⁴⁴³ Thus the representatives of the community have a chance to can consult with the community members on the issues which should be addressed in the CDA. In the event that the negotiations fail, the committee sends a petition to the Mining Cabinet Secretary.⁴⁴⁴ The Cabinet Secretary has 90 days to resolve the stalemate.⁴⁴⁵ This period is inordinately long and may result in delays in commencing the mining operations. Any party aggrieved with the Cabinet Secretary's decision has an opportunity seek redress from the Court.⁴⁴⁶ Thus the CDA regulations provide for just administrative action.

The consultations are conducted in good faith and entail dialogue between the holder of the mining license and the community.⁴⁴⁷ The two parties are required to agree and publish a schedule on how to conduct the consultations.⁴⁴⁸ The consultations are key in ensuring that the CDA negotiation process is not one-sided and that mining licence holder is aware of the concerns raised by the community. Further, the principle of Free, Prior and Informed Consent is complied with through the consultations.⁴⁴⁹ During the consultations, the license holder and the mining community are required to discuss the contents of the draft agreement.⁴⁵⁰ Thus ensuring that the community is well informed of the contents of the agreement. Lastly, the consultation process verifies that the community's representatives in the CDA committee correctly addressed the interests of the community.

The mining licence holder must assist the community in the consultation by providing funds to hire experts on behalf of the community where a community lacks the capacity to decipher the terms of the agreement or have a fruitful dialogue.⁴⁵¹ The fees paid are subject to tax relief as the consultancy fee is treated as an allowable deduction under the Income Tax Act.⁴⁵²

⁴⁴² Anri Heyns 'Mining Community Development in South Africa: A critical consideration of How the Law and Development Approach the concept "Community",' (2019) 12 *Law and Development Review* 578.

⁴⁴³ Regulation 11 (2) of the CDA Regulations.

⁴⁴⁴ Regulation 11 (4) of the CDA Regulations.

⁴⁴⁵ Regulation 11(5) of the CDA Regulations.

⁴⁴⁶ Regulation 11 (6) of the CDA Regulations.

⁴⁴⁷ Regulation 10 (1) of the CDA Regulations.

⁴⁴⁸ Regulation 10(2) of the CDA Regulations.

⁴⁴⁹ James M. Otto 'How Do We Legislate for Improved Community Development' in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 678.

⁴⁵⁰ Regulation 10 (5) of the CDA Regulations.

⁴⁵¹ Regulation 10 (7) of the CDA Regulations .

⁴⁵² Income Tax Act Chapter 470; Regulation 10 (8) of the CDA Regulations.

4.7. Contents of a Community Development Agreement

The CDA must be drafted in English, Kiswahili and in the communities local language to ensure that the community understands the contents of the CDA.⁴⁵³ Further, charts and schedules of the timelines of the mining operations and development project implementation should be included in the CDA.⁴⁵⁴ This ensures that the contents represent the collective objectives of the community and that it is understood by all the members of the community.⁴⁵⁵ It also assists the community to monitor and evaluate the implementation of the CDA.⁴⁵⁶

The project development clauses in the CDA are specifically required to address the following: “the role of the county government, educational scholarship, apprenticeship, technical training and employment opportunities for the people of the community.”⁴⁵⁷ Further, the CDA should provide ways in which the mining license holder will cater for infrastructural development and maintenance of education, health, roads, water and power facilities.⁴⁵⁸ If the main economic activity for the community is agriculture, the CDA should indicate that the agricultural products will be marketed.⁴⁵⁹ The CDA should also contain social matters, for example, assistance with the setting up of and support to small businesses, and providing support to women, youth and persons with disabilities.⁴⁶⁰ This shows the attention given to the vulnerable and marginalized groups of the community, as recommended by the CDA Model Regulations.⁴⁶¹ The mining license holder must ensure that the communities’ cultural heritage is preserved and that the ecological systems are protected.⁴⁶² The socio-economic issues addressed in a CDAs are comprehensive and ensure that the community’s main economic activities and social value systems are not endangered.⁴⁶³

⁴⁵³ Regulation 8 (2) of the CDA Regulations.

⁴⁵⁴ Regulation 8 (2)(b) of the CDA Regulations.

⁴⁵⁵ World Bank ‘Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)’ (June 2010) at 20 available at <http://documents.worldbank.org/curated/Report0June02010.pdf> accessed on 15th April 2020.

⁴⁵⁶ World Bank ‘Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)’ (June 2010) at 62 available at <http://documents.worldbank.org/curated/Report0June02010.pdf> accessed on 15th April 2020.

⁴⁵⁷ Regulation 8 (3)(a) –(c) of the CDA Regulations

⁴⁵⁸ Regulation 8 (3)(d) of the CDA Regulations

⁴⁵⁹ Regulation 8 (3)(g) of the CDA Regulations

⁴⁶⁰ Regulation 8 (3) of the CDA Regulations; World Bank ‘Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)’ (June 2010) at 40-41 available at <http://documents.worldbank.org/curated/Report0June02010.pdf> accessed on 15th April 2020.

⁴⁶¹ Regulation 8 (3) of the CDA Regulations; World Bank ‘Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)’ (June 2010) at 40-41 available at <http://documents.worldbank.org/curated/Report0June02010.pdf> accessed on 15th April 2020.

⁴⁶² Regulation 8(3)(i) and (j) of the CDA Regulations

⁴⁶³ James M. Otto ‘How Do We Legislate for Improved Community Development’ in Tony Addison & Alan Roe *Extractives Industries: The Management of Resources as a Driver of Sustainable Development*, (2018) 681.

4.7.1. Transparency and Accountability of Funds

The agreement promotes transparency of funds allocated for community development by providing that the committee discusses the clauses which shall provide for fund control mechanisms.⁴⁶⁴ This necessitates the accountability of the license holder's funds allocated for community development. Additionally, this provision ensures that the funds are only utilised for their intended purpose.

The licence holder is expected to set a minimum amount of one per cent of the gross revenue from sale of minerals to finance the projects.⁴⁶⁵ This provision is carefully worded as it does not state that the funds allocated will be derived from the profit after tax but rather from the gross revenue on sales. However, this provision is likely to be contested by mining companies because of the high expenditure costs due incurred due to the capital intensive start-up costs in purchasing machinery, leasing land and supplier costs.⁴⁶⁶ Therefore, allocating one per cent of the annual gross revenue is not favourable to them. Rather, an undertaking in the agreement by a mining company to comply with the agreed community development projects would be ideal.

4.7.2. Amendment, Publication and Accessibility of the Community Development Agreement

A CDA must be regularly amended and updated on any changes made after the parties carry out consultations and negotiations.⁴⁶⁷ Such updates or amendments must also be made provided the community is adequately consulted and represented in the deliberations.⁴⁶⁸ A review of the CDA must be conducted every five years from the date of signing.⁴⁶⁹ This is in accord with global best practices as recommended by the CDA Model Regulations which provide for amendment after five years.⁴⁷⁰ Further, this shows that the role of the CDA Committee is important before and after the signing of the CDA.

⁴⁶⁴ Regulation 8 (3)(k) of the CDA Regulations.

⁴⁶⁵ Regulation (12)(1) of the CDA Regulations. The funds should not be disbursed directly to the committee or the community but should be used to finance the agreed projects.

⁴⁶⁶ James Otto 'Fiscal Decentralization and Mining Taxation' (2001) at 4-5 available on <https://resourcegovernance.org/sites/default/files/Otto - Fiscal Decentralization and Mining Taxation.pdf> available on 20th April 2020.

⁴⁶⁷ Regulation 10 (3)(c) of the CDA Regulations.

⁴⁶⁸ Regulation 10 (3)(d) of the CDA Regulations.

⁴⁶⁹ Regulation 15 of the CDA Regulations.

⁴⁷⁰ World Bank 'Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by Professor James Otto)' (June 2010) at 62 available at <http://documents.worldbank.org/June02010.pdf> accessed on 17 April 2020; Regulation 6 (1)(k) of the CDA Regulations.

The CDA is signed by the representatives of the mining license holder and the community.⁴⁷¹ After the CDA comes into force, the Cabinet Secretary has thirty (30) days to publish the Agreement in the Ministry's website.⁴⁷² The accessibility of the CDA thus reinforces the transparency of the process and promotes accountability as the agreement is accessible to the public and may be subjected extensive scrutiny. All CDA-related reports are also published in the website.⁴⁷³

4.7.3. Reporting Obligations

A mining licence holder is required to file annual reports with the Mining Cabinet Secretary and the county government.⁴⁷⁴ The annual report must also include the expenditure of all projects carried out under the CDA.⁴⁷⁵ The annual report should contain details of the CDA including the date it was signed and any amendments.⁴⁷⁶

The annual report should any issue relating to CDA activities, milestones and challenges the mining community is facing as well as proposals for improvement.⁴⁷⁷ The CDA also contains environmental and social impacts of CDA related activities and details of any CDA special programmes which benefit youth, women, marginalised groups and persons with disabilities.⁴⁷⁸

4.7.4. Consequences of Non-Compliance

The CDA regulations provide that a mining licence can be suspended and revoked if a holder of a mining licence fails to comply with any of the conditions in the Mining Act.⁴⁷⁹ When applying for a renewal of a mining license, the CDA must be attached to the application.⁴⁸⁰

4.8. Conclusion

This Chapter provides an overview of the internationally recommended approach for mining communities engagement and the legislative requirement on CDAs. In majority of mineral-rich countries for mining operators to sign CDAs. In Kenya, although a mining licence is issued before the signing of a CDA, the requirement for a CDA is prerequisite. A consequence for non-compliance is that failure to adhere to the provisions of the CDA Regulations may lead to the

⁴⁷¹ Regulation 21(1) of the CDA Regulations.

⁴⁷² Regulation 11 (7) of the CDA Regulations.

⁴⁷³ Regulation 17 of the CDA Regulations.

⁴⁷⁴ Regulation 16 (1) of the CDA Regulations.

⁴⁷⁵ Regulation 16 (2) of the CDA Regulations.

⁴⁷⁶ Regulation 16 (1) of the CDA Regulations.

⁴⁷⁷ Regulation 16 (1) of the CDA Regulations.

⁴⁷⁸ Regulation 16 (1) of the CDA Regulations.

⁴⁷⁹ Section 147 (1)(b) of the Mining Act. The Cabinet Secretary for mining revokes or suspends mining rights on recommendation of the Mining Rights Board.

⁴⁸⁰ Section 115 of the Mining Act.

suspension or revocation of a mining licence. Further, there should be inclusivity in the consultation and negotiation process which is carried out by community representatives who include elected leaders, youth, women, disabled people and marginalized groups.

The role of the CDA committee in monitoring and evaluating CDA compliance is key as it provides a platform for continuous engagement and tracking any non-compliance by the mining licence holder. Further, the CDA Committee acts as a critical link between the community and the mining licence holder. The Committee's role is also crucial as it settles any disputes that may arise between the parties.

The provision of annual reporting by the mining licence holder as well as the consequence of suspension or revocation for non-compliance places obligation for compliance on the mining licence holder. Annual reporting provides the government and the parties to the CDA with an avenue for early detection of challenges in the implementation of the CDA. Lastly, it provides an efficient monitoring platform as the annual report must contain the expenditure of all the CDA projects.

Chapter 5: Conclusion and Recommendations

Protection of the rights of mining communities is crucial because of the negative effects of mining which they are likely to encounter.⁴⁸¹ Examples of negative effects of mining include degradation of the environment, displacement from ancestral land and disruption of social customs and norms.⁴⁸² Therefore, to minimise the risk of conflict between mining companies and mining communities, the latter should be actively involved through a meaningful consultation process prior to the grant of a mining right.⁴⁸³ This dissertation asserted that mining communities have the right to Free, Prior and Informed Consent before mining companies commence mining activities on or near their land.

The mechanisms provided for in the MPRDA to protect mining community rights include consultation with interested and affected parties,⁴⁸⁴ submission of a Social and Labour Plan,⁴⁸⁵ environmental impact assessment,⁴⁸⁶ and meeting BBEEE requirements.⁴⁸⁷ An analysis of the consultation process shows that it is comprehensive and procedurally fair. Mining companies should, therefore, strive to conduct meaningful consultations which ensures that the impacts of mining are explained to the community and their consent obtained.⁴⁸⁸ Similarly, the BBEEE programme⁴⁸⁹ promotes the interests of mining communities by providing that the host communities should benefit from a five per cent equity ownership of the mining company allotted to a Trust.⁴⁹⁰ Moreover SLPs provide programmes which aim at addressing challenges facing mine labourers and mining communities.⁴⁹¹ In relation to Mine Community Development Programmes⁴⁹² the Mining Charter provides that the proposed programmes should be completed within the financial year.⁴⁹³ and that annual compliance reports should be filed to enable the DMR to monitor compliance. It is important for these programmes to be sustainable, relevant and beneficial to the mining community.⁴⁹⁴

⁴⁸¹ Chapter 2, Section 2.2; Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) ch 1.

⁴⁸² Chapter 2, Section 2.2; Barrera-Hernandez, Barton & Godden et al *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016) ch 1.

⁴⁸³ Chapter 3, Section 3.5; *Bengwenyama-Ya-Maswazi Community and others vs Genorah Resources (Pty) Limited and others* 2011 4 SA 113 (CC) para 65.

⁴⁸⁴ Chapter 3, Section 3.5; Section 10 of the MPRDA.

⁴⁸⁵ Chapter 3, Section 3.7; Regulation 46 of the MPRDA Regulations.

⁴⁸⁶ Section 5(a) of the MPRDA; Section 1 of the National Environmental Management Act, Act No. 107 of 1998. The scope of environmental authorisation is wide and was not a focus point in this dissertation.

⁴⁸⁷ Chapter 3, Section 3.10; Section 100 of the MPRDA; Mining Charter 2018.

⁴⁸⁸ *Bengwenyama Minerals (Pty) Ltd and Others vs Genorah Resources (Pty) Ltd and Others* 2011 4 SA 113 (CC).

⁴⁸⁹ Section 100 of the MPRDA; Mining Charter 2018

⁴⁹⁰ Chapter 3, Section 3.10; Clause 2.1.4.1.4 of the Mining Charter.

⁴⁹¹ Chapter 3, Section 3.9.

⁴⁹² Chapter 3, Section 3.9; Clause 2.5.3 of the Mining Charter 2018.

⁴⁹³ Clause 2.5.3 of the Mining Charter 2018.

⁴⁹⁴ Chapter 3, Section 3.9.

The failings of the prevailing legal framework in South Africa, and suggestions how they may be reformed, are as follows. First, public participation is crucial in achieving a meaningful consultation process.⁴⁹⁵ The process leading to a substantive public participation process begins at the point of identification of the mining community for consultation purposes.⁴⁹⁶ Presently, the applicant must identify the mining community.⁴⁹⁷ However, considering that the applicant is probably not a resident of the mining area, identifying the mining community could be a momentous task.

Secondly, the Regional Manager ought to provide the applicant with technical support during the consultation process. Better yet, the consultation process should be led by a committee whose representatives encompass the DMR through the office of the Regional Manager, the mining community and the applicant. Thirdly, the framework should provide that the consultation process be conducted in the local language and the consultation report be written in both English and the mining community's native language. Fourth, it is prudent for the consultation report to be endorsed by the mining community thereby confirming their participation and consensus.⁴⁹⁸ Fifth, the consultation report should be published by the DMR for ease of accessibility. Further, the physical copies should be made available at the Regional Managers office.⁴⁹⁹

Sixth, public participation should be conducted during the formulation of SLPs.⁵⁰⁰ The views of the mining communities and stakeholders ought to be considered during the drafting of the SLP to ensure relevant development programmes are included. Seventh, SLPs should be developed in harmony with the municipality IDPs. However, the framework does not provide a mechanism to achieve this.⁵⁰¹ Inter-governmental cooperation is required for the formulation and implementation of SLPs.⁵⁰² Eighth, the framework does not provide that the annual SLP reports filed with the DMR by mining companies should be published. It is important for the annual reports to be published as this shows the extent of compliance and ensures ease of monitoring and evaluation of the implementation process.

⁴⁹⁵ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* (2016) at 66.

⁴⁹⁶ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* (2016) at 66.

⁴⁹⁷ Clause G (1) of the DMR Guideline for Consultation with Communities and Interested and Affected Parties

⁴⁹⁸ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* (2016) at 66.

⁴⁹⁹ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* (2016) at 70.

⁵⁰⁰ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* (2016) at 66.

⁵⁰¹ The South African Human Rights Commission *National Hearing on the Underlying Socio-Economic Challenges of Mine-Affected Communities in South Africa* (2016) at 67.

⁵⁰² Centre for Applied Legal Studies 'Social and Labour Plans Report II' University of Witwatersrand (2017) at 39 available on <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> accessed on 17th July 2020.

Therefore, the framework should provide a robust approach to the formulation, implementation, monitoring and evaluation of the mechanisms provided for the protection of mining communities.

This dissertation recommends that it is prudent for mining communities to be consulted in the formulation of Social and Labour Plans which provide programmes that promote socio economic development.⁵⁰³ It further recommends the publication of annual SLP reports submitted to the DMR by mining companies to enable stakeholders to monitor the progress of their implementation.⁵⁰⁴ Lastly, this dissertation recommends the use of a Community Development Agreement because it is a legally binding instrument which provides the mining company and the mining community with contractual obligations.⁵⁰⁵ Additionally, a CDA is recommended because it illustrates that a consensus has been reached between the two parties through a process that has been mutually agreed on. Further, a CDA committee whose membership entails a varied group of community representatives ensures that the negotiation and consultation process is inclusive.⁵⁰⁶ The CDA committee further provides a platform which serves as a link for continuous engagement between the mining company and the mining community and a platform of amicable settlement of disputes.⁵⁰⁷ Additionally, the CDA committee also monitors and evaluates the progress of implementation of the CDA by reviewing the annual CDA reports submitted by the mining company.⁵⁰⁸ The CDA reports published in the Ministry's website provide ease of access of review by stakeholders.⁵⁰⁹ Finally, non-compliance of the CDA may lead to revocation of the mining licence.⁵¹⁰

In conclusion, a CDA provides mining companies with an effective and efficient mechanism to carry out consultation with mining communities and to promote their socio-economic development. This dissertation, therefore, recommends the use of CDAs in the mining legal and regulatory framework in South Africa. CDAs can be incorporated into the South Africa mining framework through a legislative amendment, which entails a memorandum of the proposal being deliberated on by Parliament after it has been submitted for comments by the public.⁵¹¹

⁵⁰³ Chapter 3, Section 3.8; Centre for Applied Legal Studies (CALS) 'Social and Labour Plans First Report Trends and Analysis' (2016) at 59 available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/2017.pdf> accessed on 10th June 2020.

⁵⁰⁴ Chapter 3, Section 3.9.

⁵⁰⁵ World Bank, Community Development Agreement Model Regulations & Example Guidelines (Prepared for the World Bank by James Otto) June 2010 available at <http://documents.worldbank.org/curated/969/pdf/final0Report0June02010.pdf> accessed on 10th June 2010.

⁵⁰⁶ Chapter 4, section 4.5.5; Regulation 11 (7) of the CDA regulations.

⁵⁰⁷ Chapter 4, section 4.6.

⁵⁰⁸ Chapter 4, section 4.6, 4.5.6; Regulation 16 (1) of the CDA regulations.

⁵⁰⁹ Chapter 4, section 4.5.5; Regulation 11 (7) of the CDA regulations.

⁵¹⁰ Chapter 4, section 4.5.7; Section 147 of the Mining Act.

⁵¹¹ Section 44(1) of the Constitution.

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